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In the

Supreme Court of the United States

October Term, 1967

No. 776

THE NATIONAL COMMITTEE OF GIBRAN,
also known as THE COMITE NATIONAL DE GIBRAN,
representing THE TOWN OF BECHARRE, LEBANON,
Petitioner,

v.

GEORGE G. SHIYA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

GEORGE G. SHIYA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 10, 1967.

CITATION TO OPINIONS BELOW

The United States District Court for the Southern District of New York did not render an opinion, but its findings of fact and conclusions of law are set forth in the Record at pages 1105-1109, reproduced in Petitioner's Ap-

pendix in the Court of Appeals at pages 13a-17a, and reprinted in the Appendix hereto at pages App. 17-20, *infra*. The opinion of the Court of Appeals, which is reprinted in the Appendix at pages App. 1-16, *infra*, is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1967. See Appendix, *infra*, App. 16. A timely petition for rehearing was denied on September 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where a federal court, in the exercise of its non-diversity jurisdiction ancillary to its exclusive jurisdiction to try copyright actions, hears a fee contract dispute between an attorney and his former client relating to services performed by the attorney in the copyright litigation, should the court apply state or federal law in resolving the dispute?

2. If the federal court should apply state law, were the lower courts' determinations in this case in conflict with governing state rules?

3. If the federal court should apply federal law, (a) where the court concludes that both the contingent fee contract and the surrounding circumstances are ambiguous, should the court resolve the ambiguities against the attorney who drafted the contract, and (b) should the court inquire into the reasonableness of the amount of the fee where it appears that the fee may be grossly excessive in relation to the services performed by the attorney?

STATEMENT

This case raises important questions respecting the applicability, in a federal non-diversity action, of state law governing contingent fee contracts, and also respecting the substance of the rules applied in this case. In very general terms, the relevant facts are these: Petitioner, a Lebanese public board of trustees, entered into a contingent fee contract with respondent, a New York attorney, under which respondent defended petitioner's ownership of valuable copyrights. Petitioner's position in the federal court copyright litigation was upheld. Five years later, a dispute arose between petitioner and respondent as to the meaning of the contingent fee contract. Under petitioner's interpretation of the contract, respondent's fee would have been $45,087.86 —almost exactly the amount respondent had withdrawn from funds in his hands. Under respondent's interpretation, he would receive a fee almost surely in excess of $1,000,000. Respondent asserted his claim for additional fees in a petition for ancillary relief in the original, and long since terminated, copyright action. In defending, petitioner relied upon New York law, under which contingent fee contracts are construed very strictly against attorneys and under which the courts may reduce an unreasonable fee even where it is plainly called for under the contract. The federal district judge, however, expressly declined to apply state law, and accepted respondent's construction of the contract. The Court of Appeals, in a 2-1 decision, affirmed. Although the Court found both the fee contract and the surrounding circumstances ambiguous, it refused to construe those ambiguities against respondent, the attorney who had drafted the contract. Moreover, the Court refused to consider whether the huge fee awarded to respondent was reasonable in terms of the services respondent had rendered. Thus the Court of Appeals departed, as had the District Court, from the rules prevailing in New York state courts—rules that, as we show later, also prevail in other state and federal jurisdictions.

In more detail, the facts are as follows:

1. *The Gibran bequest and the establishment of petitioner Committee.* Kahlil Gibran, a Lebanese who acquired United States citizenship, died in the State of New York in 1931. He left a will bequeathing to his native town of Becharre the copyrights to seven of his works, the royalties from which were to be used for public purposes. In 1935, the Lebanese Government authorized the establishment of petitioner Committee to administer the Gibran bequest.[1] (CA Op., App. *infra* p. 3.)[2]

This 1931 bequest has turned out to be of enormous benefit to the town of Becharre, for today Gibran is one of the most popular of modern philosopher-poets, and by all signs his popularity is waxing, not waning. Thus, while his works over the years claimed an ever increasing public recognition, in the past seven years the sales of those works, particularly "The Prophet," have accelerated at a truly remarkable pace.[3]

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[1] Petitioner represents that on September 19, 1967, by decree of the Government of Lebanon No. 8218, his Excellency Badri Meouchy, Minister of Interior, was named provisional chairman of the Committee, and other public officials, including the Governor of Northern Lebanon and the President of the Municipality of Becharre, were named provisional members.

[2] Citations to the Court of Appeals opinion, which is reproduced in the Appendix hereto, appear herein as "CA Op." Citations to the record appear as "R." and to the Appendices, which are part of the Record, as follows: All references including a "b," such as "App. p. 155b," are to the Appendix filed by respondent in the Court of Appeals, and all references including an "a" are to the Appendix filed by petitioner.

[3] A full account of the amounts of royalties from 1946 to 1966 is set forth in the Record at App. 76a, a table that is reproduced herein in the Appendix at p. 21, *infra.* As that table discloses, from 1946 to March 31, 1960, total royalties amounted to $215,247.04, whereas from the latter date through March 31, 1966, the royalties amounted to $616,542.19.

While the litigation we describe below has impeded the flow of royalties to the Committee, the substantial sums that have been received despite the litigation have enabled the Committee to provide for the operation of a medical clinic for the poor, for the awarding of scholarships to needy students, for financial assistance to impoverished families, for aid to churches, for the operation of a museum in which the art of Kahlil Gibran is displayed, and for other charitable and cultural programs of great significance to the town of Becharre and all Lebanon (R. 1535).

2. *The copyright litigation.* Respondent was retained by petitioner because of a dispute that arose over the renewal rights to the Gibran copyrights. The first of the original copyrights expired in 1946, and the last in 1959. As they expired, renewal applications were filed both by the administrators of the Gibran estate and by the author's sister, Mary K. Gibran. The sister claimed the renewal royalties from the publisher, Alfred A. Knopf, Inc. Accordingly, the publisher held the royalties in escrow pending resolution of the dispute. To settle the controversy, Mary K. Gibran and the administrators, on January 15, 1953, commenced suit against the publisher in the Federal District Court for the Southern District of New York. The publisher thereupon interpleaded petitioner Committee, the real party in interest. (CA Op., App. *infra* p. 3; App. pp. 13a-14a.)

In that litigation, petitioner was represented by respondent. He was successful. Both the District Court and the Court of Appeals held that, under the Copyright Act, 17 U.S.C. 24, the administrators, and not Gibran's sister, were entitled to the renewal rights, and also that under the Gibran will the adminsitrators were obliged to assign those copyrights to petitioner. *Gibran v. Alfred A. Knopf*, 153 F.

Supp. 854 (S.D.N.Y. 1957), *aff'd*, 255 F.2d 121 (1958), *cert. den.*, 358 U.S. 828.[4]

3. *The contingent fee contract.* The basis for respondent's compensation in the copyright litigation was a contingent fee contract. The contest in the lower courts was whether, under that contract, respondent was entitled to 25% of the royalties that had accumulated *up to the termination of the copyright litigation*, or whether he was entitled to a 25% interest in all of the royalties *from the commencement of the copyright litigation until the ultimate expiration of the last of the copyrights in 1987.* On the first theory, his compensation would have been $45,087.86—an amount that, under cir-

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[4]While we do not wish to imply that respondent did not competently represent petitioner in this litigation, had the lower courts accepted petitioner's contention that they should inquire into the reasonableness of the fee—an issue we discuss later—it would have been relevant to examine the substantiality of Mary K. Gibran's claim to the renewal copyrights. Such an examination would, we suggest, have demonstrated that the claim verged on the frivolous. Thus, her first contention was that, under the statutory provision according priority of application for renewal copyrights first to "executors" and then to next of kin "in the absence of a will," the fact that Gibran did not name an executor in his will foreclosed the administrators c.t.a, from asserting priority over the next of kin. To ascribe to the Congress an intent to treat "executors" differently than "administrators" where the author did leave a will would, as Judge Weinfeld put it, require "slavish literal interpretation" of the Act. 153 F. Supp., at 858. Second, Mary K. Gibran contended that in any event the statute did not authorize Gibran to bequeath the renewal copyrights to petitioner because it provided only that "Copyrights secured under this title . . . may be bequeathed by will," and did not specifically mention "renewal" copyrights. Judge Weinfeld characterized this contention as being "as narrow as it is legalistic." *Id.*, at 860. Finally, Mary K. Gibran maintained that her brother had not bequeathed the renewal copyrights to Becharre and that they should pass to her by intestate succession, despite the fact that the will stated: "The royalties on my copyrights, which copyrights I understand can be extended upon request by my heirs for an additional twenty-eight years after my death, are to go to my hometown." *Id.*, at 856.

cumstances we describe later, was paid to him almost in its entirety in 1960 upon termination of the litigation. On the second theory, which was adopted by the lower courts, his compensation is virtually certain to exceed $1,000,000, and may well amount to much more.[5]

The contingent fee contract was consummated in 1956. This contract superseded a prior contract that was discussed by the Court of Appeals. Accordingly we first describe this earlier agreement and then the 1956 contract.

a. *The 1953 contract.* On December 3, 1953, the Committee's attorney-in-fact in the United States, one Dr. Basile, who had been asked for assistance by petitioner when the copyright dispute arose, signed an agreement with respondent. Under the agreement, which was drafted by respondent, respondent was retained to press the National Committee's "claim for the funds deposited in Court by Alfred A. Knopf, Incorporated, in connection with the litigation now pending" respecting Mary K. Gibran's claim to the royalties. The agreement provided that Basile would "not settle this claim in any manner without your [respondent's] consent

[5] The total renewal royalties as of March 31, 1966, were $831,789.23. See App. *infra* p. 21. From that date to March 31, 1967, while the record in this case had already been closed, petitioner represents that royalties amounted to $171,437.85. The total of renewal royalties, thus, is $1,003,227.08, of which 25% would be slightly over $250,000. Moreover, as we have already indicated, *supra* note 3, the increase in royalties in recent years has been remarkable. In 1953, when the copyright litigation began, the combined royalties for the seven preceding years were $21,518.58. In 1960 alone, the year the litigation terminated, the royalties were $42,703.74. See App. *infra* p. 21. During 1966, the royalties amounted to $170,373.20. Even assuming that royalties continue only at the 1966 rate, and excluding the as yet unexploited paperback rights, respondent would receive a minimum of approximately $750,000. As the record of royalties shows, moreover, this is a most unlikely assumption. Finally, there is a possibility that respondent may claim an interest in subsidiary rights, such as television, movie, and recording rights. The amount involved in such rights is, of course, not calculable now, but might well be very large indeed.

as attorney,"[6] and that respondent could "retain out of any moneys that may come into [his] hands, thirty-five (35%) percent of all sums recovered by settlement, suit or otherwise for or on behalf of The National Committee of Gibran. . . ."[7] (CA Op., App., *infra* pp. 3-5.)

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[6] A provision invalid as contrary to public policy. See, *e.g.*, cases collected in 100 A.L.R.2d 1386-7; 7 Am. Jur. 2d § 227.

[7] The full text of the agreement was as follows (App. p. 32a):

"George G. Shiya, Esq.
115 Broadway
New York 6, New York

Dear Mr. Shiya:

I, the undersigned, Naef K. Basile, M.D., in my capacity as attorney in fact for the National Committee of Gibran, by virtue of a power of attorney executed on June 3, 1953 by Joseph Gibrail Rahme, President of The National Committee of Gibran, do hereby retain you as my attorney to prosecute and adjust for me and for the said National Committee of Gibran, our claim for the funds deposited in Court by Alfred A. Knopf, Incorporated, in connection with the litigation now pending in the United States District Court, Southern District of New York entitled:

Mary K. Gibran and William Saxe, as administrators c.t.a. of the Estate of Kahlil Gibran, and Mary K. Gibran, Plaintiffs, against Alfred A. Knopf, Incorporated, Defendant, against The National Committee of Gibran, et al., Interpleaded Defendants.

and I do hereby give you as my said attorney the exclusive right to take all legal steps to enforce my said claim and I hereby further agree not to settle this claim in any manner without your consent as attorney.

In consideration of the services rendered and to be rendered by you as my attorney, I hereby agree to pay you, and you are authorized to retain out of any moneys that may come into your hands, thirty-five (35%) per cent of all sums recovered by settlement, suit or otherwise for or on behalf of The National Committee of Gibran in the above described action, proceeding or litigation.

Dated: New York, New York
December 3, 1953

(sgd) N. Basile M.D."

(continued)

At that time, in 1953, the amount of accumulated royalties—the "funds deposited in Court" by the publisher because of the dispute as to the ownership of the renewal copyrights—was $21,518.58 (App. *infra* p. 21). At the conclusion of the litigation, the "moneys that [came] into [respondent's] hands," the "sums recovered" on behalf of petitioner, amounted to $180,351.45 (App. *infra* p. 21; App. p. 27a).

b. *Renegotiation of the 1953 contract—the final 1956 contract.* When Basile advised petitioner prior to executing the 1953 contract that respondent demanded a 35% retainer if he paid expenses, petitioner's President responded that the percentage figure was too high and instructed respondent to search for another attorney who would charge less. Basile did so, but without success, and thereupon entered into the 1953 agreement without communicating further with petitioner. Indeed, neither respondent nor Basile advised petitioner of the terms of the retainer agreement until over a year after it was signed, when Basile responded to an inquiry by petitioner (CA Op., App. *infra* pp. 5-6; App. 166b-167b). Petitioner thereupon asked Basile to renegotiate the agreement because "Lebanese law restricted retainers to 20% and . . . the members of the Committee would be surcharged for any excess they paid" (CA Op., App. *infra* p. 5).[8]

While this letter was addressed to respondent, both Basile and respondent testified that respondent dictated it and had it typewritten and signed in his office (Reply Br. App. 7a-8a, R. 1334, 1436).

[8] At another point in its opinion, the Court of Appeals stated that the Committee "had second thoughts about the fairness of the basic agreement when the subject matter of the litigation proved far more valuable than had earlier appeared" (CA Op., App. *infra* p. 11). While the Court's statement of facts is generally accurate, this characterization of the Committee's motive in seeking renegotiation is wholly unsupported by the record. In fact, the dramatic upturn in royalties did not begin until 1960, fully five years after the date of the negotiations. See App. *infra* p. 21. The Court's first explanation of the facts giving rise to the renegotiation, quoted in the text above, is correct, not its second.

There followed an exchange of correspondence between Basile and the Committee respecting the terms upon which a new agreement might be made. The correspondence focused primarily upon whether the 35% figure in the 1953 agreement should be reduced, not upon the corpus to which that figure would relate—whether accrued royalties or future royalties as well. Thus, the relevant passages in the correspondence—which was all in Arabic—are not clear. The Court of Appeals observed: "All of these references are ambiguous; they can be read to refer either to the frozen royalties or to all the royalties" (CA Op., App. *infra* p. 12).

Following the Basile-Committee exchange of letters, respondent drafted an agreement dated September 8, 1956, which was forwarded to petitioner by Basile. Basile's covering letter, according to the Court of Appeals, contained language providing "some support for the argument that the parties intended to limit [respondent's] fee to a percentage of the funds frozen" (CA Op., App. *infra* p. 12). The Court of Appeals considered that this view of the parties' intent was also "supported by the language of the attached retainer drafted by [respondent]."

Under that retainer agreement, respondent was to receive "twenty-five per cent (25%) of all moneys determined by the Court to be due The National Committee of Gibran," and the Court "was authorized to provide that twenty-five per cent (25%) of all moneys on deposit in the Registry of said Court to the credit of the said action be paid directly to [respondent]. . . ." Moreover, the agreement explicitly provided that the amount of the fee was to be fixed as of whatever time the litigation terminated. Thus, in the event the litigation did not terminate at the district court level, a subsequent paragraph in the agreement provided that "[i]n view of the possibility of an appeal . . . you [respondent] shall be entitled to receive . . . twenty-five per cent (25%)

of all moneys due the National Committee of Gibran . . . at the time of the final determination of such appeal . . . ."[9]

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[9]The full agreement, which was drafted by respondent in the form of a letter to him from the President of the Committee (CA Op., App. *infra* p. 14), was as follows:

"George G. Shiya, Esq.
115 Broadway
New York 6, New York

Dear Mr. Shiya:

This is to confirm and to bring down to date our previous agreement with you that in consideration of legal services heretofore rendered and to be rendered by you in the action now pending in the United States District Court for the Southern District of New York, entitled:

CIVIL ACTION No. 82-18

Mary K. Gibran and William Saxe,
as Administrators c.t.a. of the
Estate of Kahlil Gibran, and
Mary K. Gibran,
Plaintiffs,
against
Alfred A. Knopf, Incorporated,
Defendant,
against
The National Committee of Gibran,
also known as the Comite National
de Gibran, et al.,
Interpleaded Defendants.

you are entitled to receive as compensation for such services twenty-five per cent (25%) of all moneys determined by the Court to be due to The National Committee of Gibran, also known as the Comite National de Gibran, and the said Court or any judge thereof is hereby authorized to provide in any appropriate judgment, decree or order in the said action that twenty-five per cent (25%) of all moneys on deposit in the Registry of said Court to the credit of the said action be paid directly to you, George G. Shiya, and that the remaining seventy-five per cent (75%) thereof be paid to The National Committee of Gibran, also known as Comite National de Gibran.

(continued)

Petitioner did not sign the proposed agreement immediately. Rather, in a letter to Basile dated October 11, 1956, petitioner asserted that the provisions of the agreement "fully contradict the agreement which has been reached...." While noting that "[i]t was agreed between them that the committee pay him 25% of the frozen money in New York upon termination of the case there, or in any other city, till the final stages," petitioner objected that "[t]he committee does not pay [respondent's] fees or expenses if the case is not won." (CA Op., App. *infra* pp. 8-9.) Petitioner had agreed to the 25% figure rather than the 20% figure that is permissible in Lebanon because petitioner considered the additional 5% offset by respondent's agreement to bear the expenses of litigation (CA Op., App. *infra* p. 6); but the proposed agreement contained no provision respecting expenses.

In response to the request for clarification, respondent on November 1, 1956, wrote the Committee a letter "to confirm the agreement" between the parties and "supplement-

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In view of the possibility of an appeal by one or the other of the parties to said action from the determination of the said District Court, it is our further understanding and it is agreed that you shall be entitled to receive as compensation for your services twenty-five per cent (25%) of all moneys due The National Committee of Gibran, also known as the Comite National de Gibran, at the time of the final determination of such appeal or appeals whether said moneys are on deposit in the Registry of the said Court or in the hands of Alfred A. Knopf, Incorporated, and the said Knopf is hereby authorized and directed to make such payment to you and to remit the remaining seventy-five per cent (75%) thereof to The National Committee of Gibran, also known as the Comite National de Gibran.

Joseph Gibrail Rahme,
President

The National Committee of Gibran,
also known as the Comite National de
Gibran"

ing the written retainer forwarded to you in September...." That letter, which was signed by the Committee and returned to respondent, met the objections raised by the Committee.[10] Thus, the November letter made it clear that respondent was to be entitled to a fee "only in the event that the final judgment in this case is rendered in favor of Comite National De Gibran," and also that in the event of an unfavorable outcome of the copyright litigation respondent would "make no claim for . . . expenses and disbursements." This, then, was the final contract—the contingent fee arrangement reflected in the September, 1956 agreement, as supplemented by the November 1956 letter—both drafted by respondent.

4. *Respondent's actions after termination of the copyright litigation.* At the conclusion of the copyright litiga-

[10]The text of the letter was as follows:

"November 1, 1956

"Comite National De Gibran
Becperry, Lebanon

Dear Sirs:

This letter will serve to confirm the agreement between us supplementing the written retainer forwarded to you in September for your signature before the American Consul in Beirut.

It is understood and agreed between us that the payment to me of the sum of 25% of the monies due and owing from Knopf to the Comite National De Gibran, will be made after the termination of the litigation in the U.S. District Court and any other court to which the case may be taken on appeal. Such payment is to be made to me only in the event that the final judgment in this case is rendered in favor of Comite National De Gibran.

It is also understood and agreed that the above compensation of 25% of monies due and owing from Knopf to Comite National De Gibran will include payment for services rendered by me in this matter, in addition to all expenses and disbursements incurred by my office in connection with the litigation of this matter and that I shall make no claim for such expenses and disbursements or compensation for services herein, in the event that final judgment herein is rendered against Comite National De Gibran.

Yours very truly,
George G. Shiya"

tion and subsequent probate court accounting proceedings, the administrators of the Gibran estate transmitted to respondent checks totalling $180,351.45, representing the net royalties that had accumulated during that litigation. The checks were payable jointly to respondent and to petitioner. Of that sum, pursuant to authority secured from the probate court, $141,000 was retained by respondent to protect the estate's adminsitrators against supposed possible tax liability.[11] Of the balance, $39,351.45, respondent withdrew all but $10.00 for attorney's fees. (App. 15a, 27a, Reply Br. App. 10a-11a, R. 1362-9).

This withdrawal by respondent was made with Basile's consent, but neither respondent nor Basile informed petitioner of it until three years later, in November, 1963 (*ibid;* App. 55a, R. 1369). In 1964, upon the tolling of the statute of limitations upon any possible tax liability, respondent withdrew an additional $5,000 from the fund in his hands—again with Basile's consent but again without either of them advising petitioner (R. 1458-9). Thus respondent had withdrawn virtually his full fee, under petitioner's view of the contract (25% of royalties accrued at termination of the litigation), without either telling petitioner that he had done so or suggesting that he had any claim to a share in royalties payable after termination of the litigation.

Pursuant to the judgment in the Committee's favor in the copyright litigation, the publisher began paying royalties once again to the Committee. Thus, in July of 1963 the Committee received $197,915.76—the Committee's first income

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[11] The "tax question" was solved by respondent by allowing the statute of limitations to toll, which resulted in the withholding of the funds from the Committee for 4 years. Actually, the Committee had been declared exempt from taxes as early as 1936 in a letter ruling from the Internal Revenue Service (App. 74a), and it was only upon the basis of the Committee's liability that the administrators could have been held liable. Respondent testified that he was ignorant of that ruling (App. 97b).

since 1946, when Mary K. Gibran asserted a right to the renewal copyrights. Respondent did not suggest to petitioner that he had any claim to these royalties. Three additional substantial distributions—$44,684.25, $60,520.51, and $61,289.65—were made to the Committee by the publisher in 1964 and in 1965 also without objection by respondent (App. p. 78a).

During this period of time—1960 through 1964—the Committee attempted to secure information respecting the $180,351.45 that had been distributed in 1960 by the administrators to respondent for the account of the Committee (*e.g.*, App. pp. 52a-54a, 58a-72a). The exchange of letters between the Committee and its agent, Basile, became rather heated, and finally on January 11, 1965, Basile replied to the Committee's final ultimatum for an accounting with a final ultimatum of his own (App. p. 68a). In this letter, Basile stated that respondent "considers that $85,000.00, in addition to the sum he received before [$44,341.45], should take care of his demands and the demands of his assistants. This means that the amount suggested by him previously is not considered enough. . . ." On his part Basile demanded compensation of $4,000 a year, or $48,000, plus expenses, although in the past he had assured the Committee that he was donating his services because of his devotion to his former countrymen (*e.g.*, App. p. 151b, Reply Br. App. 1a). Basile's and respondent's demands together amounted to almost exactly the accrued royalties in respondent's hands. Basile said that if the Committee did not agree to these demands, respondent would sue and would ask for 35%—the figure specified in the 1953 agreement—of the royalties that had already accrued as well as "a share of the returns during the coming 28 years specified in the copyrights that were won." And Basile threatened to join the suit and to ask for $6,000 a year instead of $4,000. He stressed the fact that litigation would involve large expenses because of respondent's plans to conduct exhaustive discovery, and concluded with the "final and sincere word" that the "only logical thing that [the Committee] can do is to agree on settling

this problem," because if there is litigation "the expenses it might incur can be much higher than what can be agreed upon as an amount for settlement." Basile testified that he had shown this letter to respondent, who said, "Write it and we will see what they answer," but "they didn't answer" (Reply Br. App. p. 7a).[12]

5. *The contingent fee litigation.* The Committee did not accede. Four months later, on April 29, 1965, respondent brought suit by way of a petition invoking the ancillary jurisdiction of the district court that had decided the copyright litigation (App. p. 18a). The service upon petitioner of respondent's petition was the first and only demand received by petitioner from respondent for a percentage of royalties earned after termination of the copyright suit. Indeed, it was the only writing, other than the contingent fee agreement itself, in which respondent discussed his fees.

While respondent did not even mention the 1956 agreement in his petition, but rather relied upon the 1953 agreement in support of a claim for 35% of all royalties to be received until expiration of the renewal copyrights in 1987 (App. p. 18a), in the course of the litigation he contended that in any event the 1956 agreement at least clearly entitled him to 25% of those royalties. Petitioner, on the other hand, contended that the 1956 agreement clearly restricted respondent to 25% of the royalties accumulated at the time of termination of the copyright litigation, and maintained also that in any event, under New York law, any ambiguities in the contract were to be resolved against respondent

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[12] In response to the question, "Did you not or had you any idea that Dr. Basile was to write this letter to the Committee," respondent testified: "Dr. Basile wrote his letters independently of me, sir. I had no control over what he wrote to the Committee. It was his affair, I dealt with him. But I did not ask him to make any representations on my behalf. He would come to me with various ideas from time to time and put them to me and ask me questions, but I never authorized him to write anything on my behalf. I was fully capable of writing myself." (R. 1505-6, App. 101-2b.)

(Trial Mem. pp. 36-38, R.1413). During the trial, petitioner also attempted to elicit information relevant to the issue of the reasonable value of the services respondent had actually performed (Reply Br. App. pp. 13a-15a, R. 1483-6).

The District Court excluded that type of evidence on the theory that the Court had no power to supervise the amount of the contingent fee once it decided what fee was called for under the terms of the contract (*ibid.*). As to the latter question, the Court concluded that the 1956 agreement was controlling, not the 1953 agreement; but it also concluded that under the 1956 agreement respondent was entitled to a 25% interest in both past and future royalties (App. *infra* p. 20). As to all questions bearing upon the contract dispute, Judge Ryan refused to apply New York law, stating:

> "I do want to point this out to you: The jurisdiction of the Court in this case is an original jurisdiction; it is not predicated on diversity. It dealt with the right to receive a copyright. That is the way the matter came into the court and, it being a Federal matter, I would, of course, even on the fixing of counsel's fee, be guided by Federal law" (R. 1582, App. 116b).[13]

The Court of Appeals, in an opinion by Judge Smith joined in by Judge Kaufman but dissented from by Judge Hays, affirmed. While the Court did not explicitly advert to the appropriate choice of laws, plainly enough it was of the view that the New York law respecting ambiguous or excessive contingent fee contracts was not applicable. First, the Court conceded that the contract was ambiguous, and accordingly looked to "evidence of the circumstances surrounding its making." As to those circumstances—various

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[13]The Court went on to point out that as to a matter not relevant to this petition—the jurisdiction of the Court to award fees relating to legal problems respecting the original, rather than the renewal, copyrights—New York and federal law were in accord that no jurisdiction existed (*ibid.*).

exchanges of correspondence—the Court conceded that the Committee was "able to point to language which appears to limit the fee to a percentage of the funds in court at one or another stage. . . ." Nevertheless, without even mentioning New York law respecting resolution of ambiguities in favor of clients, the Court construed the contract in favor of the attorney. Second, the Court, again without mentioning contrary New York decisions, affirmed the District Court's refusal to consider the question of the reasonableness of the fee.

Judge Hays, on the other hand, dissented on several grounds. First, taking at face value the majority's view that the contract was ambiguous, he said that "the minimum which should be required of a lawyer in relation to his client is that he make clear how much his fee is going to be," and that this was "enough to justify denying Shiya [respondent] the recovery he seeks . . . ." Secondly, Judge Hays said "I believe that the Committee's interpretation of their agreement is in fact the correct interpretation." Thus he believed that the contract clearly provided only for an interest in the royalties accumulated during the litigation, not future royalties. Finally, looking to extrinsic circumstances, Judge Hays observed that, among other considerations, it was revealing that respondent had "fail[ed] to assert any claim to renewal royalties paid to the Committee after termination of the Surrogate Court proceedings." He concluded: "If any ambiguity remains . . . it ought to be construed against Shiya who could easily have avoided any difficulty by providing clearly for a 25% interest in the future royalties."

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the law to be applied to attorney-client fee litigation in federal courts. There is a conflict among the Courts of Appeals as to the choice between federal and state rules for deciding such litigation. Apart from the choice of law problem, the rules applied by the courts below in determining this litigation are

not consonant with the rules applied in other courts, both federal and state.

A. Choice of Laws in Fee Contract Litigation

As we now show, the question of choice of law is of considerable consequence in view of the volume of attorney-client fee litigation in federal courts and the divergent substantive rules applied in the several states. Moreover, the refusal of the courts below to apply New York law—law that decidedly favors petitioner—gives rise to a conflict among circuits involving a type of problem that often has received the attention of this court.

1. *Incidence of federal court fee litigation.* Disputes between attorneys and clients respecting fees are, regrettably, a frequent subject of litigation in federal courts, and a good deal of that litigation involves contingent fee disputes.[13a] Even where there is not diversity of citizenship between attorney and client, the federal courts entertain attorney-client fee litigation where the dispute arises out of the attorney's representation of the client in a federal court action between the client and another party.[14] The theory is that the federal court, having had jurisdiction of the litigation between

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[13a] See, *e.g.*, the extensive collection of cases cited in 4 Mod. Fed. Prac. Dig., Attorney & Client, §§ 130-192, and in 6 Fed. Dig., Attorney & Client, §§ 130-192.

[14] See, *e.g.*, *United States v. Transocean Airlines, Inc.*, 356 F.2d 2 (5th Cir. 1966); *Pitcher Construction Co. v. United States*, 322 F.2d 843 (9th Cir. 1963); *Application of Kamerman*, 278 F.2d 411 (2d Cir. 1960), *reversing* 166 F. Supp. 324; *Falcone v. Hall*, 235 F.2d 860, 98 U.S. App. D.C. 363 (D.C. Cir. 1956); *United States Fidelity & Guaranty Co. v. Levy*, 77 F.2d 972 (5th Cir. 1935); *Sharor v. Pollia*, 191 F.2d 116 (10th Cir. 1951); *German v. Universal Oil Products Co.*, 77 F.2d 70 (8th Cir. 1935); *Woodbury v. Andrew Jergens Co.*, 69 F.2d 49 (2d Cir. 1934); *Lehigh & N.E. R. Co. v. Finnerty*, 61 F.2d 289 (3rd Cir. 1932); *Byram v. Miner*, 47 F.2d 112 (8th Cir. 1931); *In Re Badger*, 9 F.2d 560 (2d Cir. 1925); *Machinski v. Lehigh Valley R. Co.*, 272 Fed. 920 (2d Cir. 1921); *In Re Hoy's Claim*, 93 F. Supp. 265 (D. Mass. 1950); *Nolan v. Hemingway Bros. Interstate Trucking Co.*, 88 F. Supp. 111 (S.D. N.Y. 1950); *United States v. Hudson*, 39

the client and another party, has ancillary jurisdiction to resolve the dispute between the client and the attorney who represented the client in the original action.[15] That was the basis for federal court jurisdiction in the case at bar (*supra*, p. 16).

2. *Importance of the choice of laws question.* The choice between state and federal law is critically important to the outcome of this type of federal court litigation. In the states, widely divergent rules govern fee litigation. The law of New York with respect to the instant litigation, for example, does not correspond entirely to the law of other states. In New York, the courts inquire into the reasonableness of fees prescribed by contingent fee contracts. In the leading case of *Gair v. Peck*, 6 N.Y.2d 97, 160 N.E.2d 43, 48 (1959), *cert. den.*, 361 U.S. 374, the New York Court of Appeals stated: "Contingent fees may be disallowed between an attorney and his client in spite of a contingent fee retainer agreement if the amount becomes large enough to be out of all proportion to the value of the professional services rendered. . . ." While some other jurisdictions are in accord,[16] others are not.[17] And while the New York rule

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F. Supp. 797 (D. Mont. 1941); *Lawrence v. Commodore Nav. Corporation*, 27 F. Supp. 139 (S.D. N.Y. 1939); *Nic Projector Corp. v. Movie-Jecktor Co.*, 16 F. Supp. 605 (S.D. N.Y. 1935); *Ingold v. Ingold*, 30 F. Supp. 347 (S.D. N.Y. 1939); *Brown v. Morgan*, 163 Fed. 395 (D. Iowa 1908); *Buchner v. Metal Stamping Co.*, 19 F.2d 529 (E.D. N.Y. 1926); *Massachusetts & So. Const. Co. v. Township of Gill's Creek*, 48 Fed. 145 (C.C.D. So. Car. 1891).

[15] See the discussion by Judge Learned Hand in *Woodbury v. Andrew Jergens Co.*, 69 F.2d 49 (2d Cir. 1934), the seminal decision on this subject.

[16] See *Bryant v. Hand*, ___ Colo. ___, 404 P.2d 521, 522-3 (1965); *Husk v. Blancand*, 155 La. 816, 99 So. 610, 612 (1924); *Hamilton v. Grady*, 41 N.E.2d 968, 314 Ill. App. 568 (1942); *Woods v. First Nat. Bank of Chicago*, 314 Ill. App. 340, 41 N.E.2d 235, 237 (1942); *Summerfield v. Clark*, 300 Ill. App. 610, 21 N.E.2d 852 (1939).

[17] See, *e.g.*, the New Jersey decisions cited in *Gray v. Joseph J. Brunetti Construction Co.*, 266 F.2d 809 (3d Cir. 1959); *Bengoechea*

that ambiguous contracts are to be construed against attorneys appears to be generally accepted in other jurisdictions,[18] it is perhaps more rigorously enforced in contingent fee litigation in New York than anywhere else.[19]

Thus, the adoption by the federal courts of a body of federal substantive law governing attorney-client fee litigation would often result in departures from the rules that

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Macias v. De La Torre & Ramirez, 84 F.2d 894, 896 (1st Cir. 1936). In many jurisdictions, the courts will inquire into the amount of a contingent fee only if it is "unconscionable," and "[t]o be unconscionable it must be such as no man in his senses and not under a delusion would make on one hand, and as no honest and fair man would accept, on the other." *Board of Education v. Thurman*, 121 Okla. 108, 247 Pac. 996, 997-8 (1926). See, *e.g.*, decisions cited in 7 C.J.S. p. 1065. *Gair v. Peck* liberalized the standard in New York. See *Appellate Court's Power to Establish Contingent Fee Schedule Upheld*, 60 Colum. L. Rev. 242, 246 (1960).

For another illustration of differing state rules, consider the status of a fee contract entered into after establishment of the attorney-client relationship. In North Carolina, such a contract is void as a matter of law, and the attorney may recover only "reasonable compensation" for his services. *Stern & Swift v. Hyman Bros.*, 182 N.C. 422, 109 S.E. 79, 80 (1921). In Illinois and California fee contracts of this sort are "presumptively fraudulent" and "presumptively invalid," respectively, with the attorney's having the burden of proving that the contract is fair and made in good faith. *Miller v. Solomon*, 49 Ill.App.2d 156, 199 N.E.2d 660, 665 (1964); *Denton v. Smith*, 101 Cal. App. 2d 841, 226 P.2d 723, 725 (1951). On the other hand, Oklahoma places the burden of proving fraud or unfairness upon the client. *Renegar v. Staples*, __ Okla. __, 388 P.2d 867, 872 (1963).

For other examples of differing state rules, see, *e.g.*, 7 C.J.S. pp. 1067-1074.

[18] See the many cases cited in 7 C.J.S., Attorney & Client, §§ 182, 187.

[19] There are a number of reported decisions applying the rule, and it is stated in the most rigorous terms. Thus, in *Mackey v. Passaic Stone Co., Inc.*, 36 N.Y.S.2d 232, 234 (1942), the court said: "It is

would be applicable under state law. Indeed, such a departure occurred in the case at bar, as we have already indicated. The Court of Appeals, while concluding that both the contract and the extrinsic circumstances were ambiguous, refused to resolve doubts against the attorney, thus rejecting petitioner's heavy reliance upon the New York rule to the contrary. And in holding that *quantum meruit* principles would be relevant only "[h]ad the [District] Court held that there was no meeting of the minds on amount" (App. *infra* p. 15), the Court of Appeals turned aside petitioner's contention, based on *Gair v. Peck, supra,* that contingent fee contracts are always subject to the test of reasonableness. It may be noted parenthetically, moreover, that to the extent the Court's further remark that in a *quantum meruit* action "an award of 25% of the value of the recovery . . . would not be extravagant" can be considered an alternative ground for rejection of petitioner's contention, it, too, does not appear consistent with New York law. Nothing in *Gair* suggests that courts are to restrict their inquiry to a simple mathematical comparison between the amount of the fee and the value of the recovery, and are to ignore the factors normally considered by courts as relevant to the test of reasonable-

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well settled that if an ambiguity arise with respect to an agreement between an attorney and his client the agreement is to be construed most strongly in favor of the client. *Matter of Hawke v. Simpson,* 148 App. Div. 326, 328, 133 N.Y.S. 23. As we stated in *Samuels v. Simpson,* 144 App. Div. 466, at page 469, 129 N.Y.S. 534, at page 536: 'An attorney ought to have his agreement with his clients so plain as not to require construction, and, even though the client has independent advice, we think that doubtful clauses are to be construed most strongly against the attorney.'" See also *In re Smith's Will,* 11 Misc. 2d 170 N.Y.S.2d 27 (1958); *Gehr v. Finkelstein,* 129 N.Y.S.2d 284 (1954); *In re Vaupel's Estate,* 37 N.Y.S.2d 853, *aff'd* 266 App. Div. 723, 40 N.Y.S.2d 956 (1942); *Race v. Harris,* 286 N.Y.S. 168, 246 App. Div. 367 (1936); *Newcomb v. Whitehouse,* 162 N.Y.S. 249 (1916).

ness – factors such as the time expended by the attorney and the complexities of the issues with which he dealt.[20]

3. *Conflict respecting choice of laws.* In the main, federal court decisions respecting fee contracts do not clearly reflect whether the courts applied state or federal law.[21] In the Third and Eighth Circuits, however, the rule is plain: state, not federal, law governs. In *Carter v. Spanos*, 250 F.2d 814, 816 (8th Cir. 1958), a diversity action arising out of an attorney's prior representation of a client in a federal antitrust suit, the Court held that the validity of the contingent fee contract was established by state law. And in *Gray v. Joseph J. Brunetti Construction Co.*, 266 F.2d 809 (3d Cir. 1959), a diversity action arising out of an attorney's prior representation of a client in federal agency negotiations, the Court held that the lower court had erred in reducing the fee below the amount called for by the contract because under state law the contract had to be enforced as written.

Gray and *Carter* cannot reasonably be distinguished on the ground that they were diversity actions whereas the case

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[20] As we show later (*infra* p. 32), this narrow test of reasonableness is also in conflict with the law prevailing in the Fourth Circuit. As to other states, in Colorado the rule is that "the court . . . will determine the reasonableness of the amount and will subject it to the test of quantum meruit . . . . [I]t should determine . . . the time spent, the novelty of the questions of law, and the risks of non-return to the client and to the attorney . . . ." *Bryant v. Hand*, __ Colo. __, 404 P.2d 521, 523 (1965). As to *quantum meruit*, see 7 C.J.S. pp. 1120-1128.

[21] See, generally, the cases cited in note 14, *supra*. Of course, federal courts do look to state law on certain types of collateral matters not relating to the merits. Thus, those courts that consider that ancillary jurisdiction exists only where, if the attorney's claim is valid, it entitled him to a lien under state law naturally rely upon state law with respect to the scope of an attorney's lien. See, *e.g.*, *Pitcher Construction Co. v. United States*, 322 F.2d 843 (9th Cir. 1963); *German v. Universal Oil Products Co.*, 77 F.2d 70 (8th Cir. 1935); *Strickland v. Sellers*, 78 F. Supp. 274 (N.D. Tex. 1948).

at bar involved ancillary federal jurisdiction. The consequence of such a distinction would be that, where there is diversity of citizenship between the attorney and his client and where the original action in which the attorney represented the client was tried in federal court, the attorney could elect either federal or state law, depending upon which favored his claim, by invoking either the ancillary or the diversity jurisdiction of the federal court. Such an option would have been open in *Carter*, a diversity case where the initial action was an antitrust suit, and in the case at bar, an ancillary jurisdiction case where there was diversity of citizenship between attorney and client. Accordingly, it is clear that the choice of law in this type of case should be governed by the principle that it is the origin of the right sought to be enforced, not the ground on which the court has jurisdiction, that determines the law according to which the claim in controversy must be adjudged. See *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410-411; *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245; *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176; *Board of County Comm'rs v. United States*, 308 U.S. 343, 349-350; *Wichita Royalty Co. v. City National Bank*, 306 U.S. 103, 107.

The only other basis upon which the existence of a conflict might be thought unclear would be the notion that, since the Court of Appeals did not explicitly state which law it was applying, perhaps it did not agree with the District Court's view that federal law governs. But that is most unlikely. New York law is, as we have indicated, hostile to respondent's position. That is not very startling, since, as this Court is aware, New York has devoted perhaps unparalleled attention to the problems raised by contingent fee contracts.[22] Accordingly, had the Court of Appeals consid-

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[22] In addition to *Gair v. Peck, supra*, see *Anonymous v. Baker*, 360 U.S. 287; *Cohen v. Hurley*, 366 U.S. 117; and *Spevak v. Klein*, 385 U.S. 511. For the leading New York investigations beginning in 1908, see 31 N.Y.S.B.A. Rep. 99; the Wasservogel Report, 14 Mass. L. Q. 1 (1928); The Botein Report, Ass'n of the Bar of the City of N.Y. Year-

ered state law binding, at the very least it would have attempted to distinguish the New York decisions so heavily relied upon by petitioner. But the Court did not so much as cite a single New York decision – or for that matter any decision of any other court as to the point in issue. Thus in this respect the ground for review is stronger than that in *Kermarec v. Compagnie Generale,* 358 U.S. 625, 628, a choice of laws case in which this Court stated:

> "The opinion of that court [the Court of Appeals] does not make clear whether affirmance was based upon agreement with the trial judge that New York law was applicable, or upon a determination that the controlling legal principles would in any event be no different under maritime law. . . . Certiorari was granted to examine both of these issues. . . ."

4. *Considerations respecting the choice of law.* Since *Erie R. Co. v. Tompkins,* 304 U.S. 64, the problem of choice of laws in both diversity and non-diversity federal court litigation has repeatedly engaged the attention of this Court. Under the principles established by this Court, the determination by the lower courts that federal, rather than state, law governed in the case at bar is highly questionable.

As the *Gray* case in the Third Circuit holds and as the most obvious application of the *Erie* doctrine indicates, an attorney-client retainer contract is enforceable by virtue of state law and, hence, the rules by which it is to be construed and applied emanate from state law. Moreover, the states have a particularly strong interest in establishing rules to govern the sensitive and important relationship between attorneys and their clients. To be sure, the Congress could validly regulate attorneys' fees for representation before federal courts or agencies or in connection with federal programs.[23] But there has been no exercise of this power in

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book 293 (1938). See also MacKinnon, Contingent Fees for Legal Services: A Study of Professional Economics and Responsibilities (1964).

[23] See *Brown v. Gerdes,* 321 U.S. 178; *Hines v. Lowrey,* 305 U.S. 85.

connection with copyright litigation.[24] In such circumstances, the teaching of this Court's decisions is that state law is not pre-empted. Since *Erie*, "[t]he instances where [this Court] has created federal common law are few and restricted." *Wheeldin v. Wheeler*, 373 U.S. 647, 651. Just last year the Court, in *Wallis v. Pan American Pet. Corp.*, 384 U.S. 63, 68, said:

> "In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions [of the type involved in the litigation]. . . . Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area . . , it must be remembered that 'Congress acts . . . against the background of the total *corpus juris* of the states. . . .'"

See also *United Automotive Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696; *De Sylva v. Ballentine*, 351 U.S. 570, 580-581; *Wilburn Boat Co. v. Firemen's Fund Ins. Co.*, 348 U.S. 310; *United States v. Standard Oil Co.*, 332 U.S. 301, 309; *Board of County Comm'rs v. United States*, 308 U.S. 343, 351-352.

The only policy that might support the applicability of federal law is the interest of the federal courts in supervising the relationship between clients and the attorneys who

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[24] Section 40 of the Copyright Act, 17 U.S.C. §116, provides for awarding a reasonable attorney's fee to the prevailing party in copyright litigation. Such an award, of course, runs against the losing party in favor of the prevailing party. The authority to make such an award does not imply authority to declare rules governing the construction of the fee-bargain between each party and his own attorney.

are officers of those courts, particularly in connection with litigation such as copyright controversies as to which federal courts have exclusive jurisdiction. 28 U.S.C. 1338. If there is to be pre-emption of state law on this basis, the ultimate source of authority would be Article III of the Constitution. Something of the sort is suggested in *In Re Hoy's Claim*, 93 F. Supp. 265, 267 (D. Mass. 1950). There Judge Wyzanski expressed doubt whether state attorneys' lien laws should be enforceable in federal court fee litigation where the attorney had represented the client in litigation justiciable only in federal courts.

> "But does it do violence to Article III of the United States Constitution and to the Supremacy Clause of Article VI of the United States Constitution for a state legislature to regulate the substantive relationship between a litigant in the federal courts and his counsel? It might be argued that (1) it is the United States Court acting under Article III . . . and statutes and rules pursuant thereto that admits the attorney to practice before it, (2) his conduct and his rights in connection with litigation in United States Courts are, therefore, the *exclusive* concern of the United States and (3) because of the Supremacy Clause of Article VI . . . no state can govern the relationship of the attorney and of the client in the United States Courts. . . ."[25]

But, conceding the federal courts' interest in overseeing the attorney-client relationship, there is no reason to suppose that this interest will not be adequately safeguarded

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[25]The Court held the lien law applicable because the action was based purely on diversity, "*without in any way intimating any view as to what is the situation where the attorney represents the client in connection with a cause of action which arises out of a federal statute, which is not homologous to a cause of action arising out of state law and which is justiciable only in a United States Court . . . .*" (Emphasis in original.) See also *Cord v. Smith*, 338 F. 2d 516, 524 (9th Cir. 1964).

through the application of state law to fee disputes. Doubtless this particular case, in which the law of New York evidences a more sensitive regard for the rights of clients than the law applied by the lower federal courts, may not be typical. But, if state rules were to fall short of desirable standards, the federal courts could act by way of their disciplinary or rule-making authority or the Congress by way of its legislative authority. In the absence of such federal rules or statutes, it is hard to see why state law should not govern. And it is even harder to see why, particularly in the case of New York law, state law should not at the very least be incorporated into federal law, assuming *arguendo* that Article III suffices to pre-empt state law as the independent source of the substantive law governing this sort of litigation. See, *e.g., United Automotive Workers v. Hoosier Cardinal Corp.* and *De Sylva v. Ballentine, supra.*

In short, entirely apart from the conflict of decisions, the lower court's decision respecting choice of laws is sufficiently dubious when measured against this Court's decisions, and sufficiently important in terms of its impairment of state interests, to warrant review.

B. Conflicts Respecting the Substantive Principles Applied by the Lower Courts

Beyond the question of choice of laws, the decision below raises significant problems respecting the substantive rules governing this type of litigation. If state law controls, then, as we have already indicated, there is an apparent conflict between the rules applied by the Court of Appeals and those applied under New York law. Under Rule 19 of the Rules of this Court, such a conflict alone justifies review. If, on the other hand, federal law governs, then the Court of Appeals applied rules that differ from those applied in other federal jurisdictions, as we now demonstrate.

1. *Strict construction of attorneys' fee contracts.* The principle that, in fee contract disputes, ambiguities in the contract are to be resolved against the attorney who drafted

the document is firmly established, not only in New York, but also in other federal jurisdictions. As the Court of Appeals for the Fifth Circuit put it in *Vans Agnew v. Fort Myers Drainage Dit.*, 69 F.2d 244, 246 (1934): "Even if it properly may be considered that the language used justifies a doubt. . , as [the attorney] chose that language, a doubt as to its meaning is to be resolved against him." See also *Ridge v. Healy*, 251 Fed. 798, 804 (8th Cir. 1918) ("Such a contract, in case of dispute as to the meaning of its terms, will be construed most strongly against the attorney."); *Waugh v. Q. & C. Co.*, 16 F.2d 363, 365 (7th Cir. 1926).[26]

This principle is supported by the considerations underlying the more general rule that documents are to be construed against the drafting party. It is, moreover, also supported by the policy of enforcing the duty of attorneys to secure the interests of their clients. "In a very real sense attorneys are officers of the courts in which they practice; and clients are wards of the court in regard to their relationship with their attorneys. . . . Fee contracts between attorney and client are a subject of special interest and concern to the courts. They are not to be enforced upon the same basis as ordinary commercial contracts. . . ." *Spillker v. Hankin*, 188 F.2d 35, 37-8, 39 (D.C. Cir. 1951). Thus, as Judge Hays put it in this case, "[T]he minimum which should be required of a lawyer in relation to his client is that he make clear how much his fee is going to be." Unless the client is to be required to retain a second attorney to represent him in the fee negotiations, his attorney, in drafting the fee contract, must protect his client by removing every reasonable possibility of misunderstanding. If he does not discharge that responsibility, his expectation should be sacrificed, not his client's.

Beyond these considerations, which apply even where the attorney has been merely negligent, the rule of strict construction also helps prevent deliberate malfeasance. To apply the law of ordinary commercial contracts invites abuse, for

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[26] As to state decisions, see 7 C.J.S., Attorney & Client, §§ 182, 187.

it permits attorneys to seize upon ambiguities in fee contracts in order to demand additional compensation; and particularly in contingent fee situations, such demands cannot easily be resisted, for the attorney typically has control over the sums recovered and can compel his erstwhile client to retain a new attorney to institute a second lawsuit to enforce his rights. See *Faber v. Enkema*, 180 Minn. 493, 321 N.W. 410 (1930); *Hoboken Trust Co. v. Norton*, 90 N.J. Eq. 314, 107 Atl. 67 (1919).[27]

In the case at bar, the Court of Appeals, in refusing to resolve ambiguities against respondent, departed from the rule established in federal court decisions like *Vans Agnew*. Moreover, this case reveals how far the Court of Appeals will carry its views, since it is difficult to see how the contract could even be regarded as ambiguous. As to the central document—the September, 1956 agreement—the Court conceded that it "supports" petitioner (App. *infra* p. 12). That puts it conservatively. The agreement plainly restricts respondent's fee to a share of accumulated royalties at whatever stage the litigation terminated. Thus, if there were an appeal, the agreement provided for a share of "all moneys due The National Committee . . . at the time of the final determination of such appeal." There would have been no point to that provision respecting royalties accrued during an appeal if in any event respondent were to receive a share in *all* renewal royalties.

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[27]In this connection, we speak only of the general importance of the issue. That is, while there can be no question that respondent failed to provide clearly in the contract for the fee he later claimed, this petition is based upon the assumption that this default was not deliberate. The District Court found that respondent "was at no time guilty of any unprofessional conduct, breach of professional ethics, or overreaching but rendered faithful, and most valuable legal services . . ." (App. *infra* p. 19). The question whether this finding was adequately supported would not, of course, be a sufficient basis for seeking certiorari.

Interestingly enough, the Court paid little attention to the September agreement and focused instead on the November, 1956 letter from respondent to petitioner—a letter labeled by respondent as "confirming" and "supplementing" the September agreement and directed to certain objections of petitioner not related to the issues in suit. But in any event the November letter does not support respondent either. It refers to "25% of the monies due and owing from Knopf to the Comite National De Gibran," not to 25% of all moneys due or "to become due." Moreover, as the Court of Appeals itself noted (App. *infra* p. 10), the November letter provided that respondent's fee would be paid upon termination of the litigation. Accordingly, what was obviously intended was a single "payment" of a specific "sum," to use the words of the letter—an intention wholly inconsistent with the notion that respondent was to receive periodic royalty payments over a twenty-year period. It is absurd to suppose that, had respondent intended to receive such future royalties, he would have failed so to specify in his agreement.[28]

Finally, respondent's actions after termination of the litigation in 1960 were revealing. First, he took from the funds

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[28] It would extend this petition unduly were we to discuss in detail the superseded 1953 agreement, which is set forth at note 7, page 8 *supra*. We observe only that it, too, referred to the "claim for the funds deposited in Court by Alfred A. Knopf, Incorporated," as to which respondent was to receive 35% "of all sums recovered." If the language is not clearly in petitioner's favor, at the least it is ambiguous. So the Court of Appeals evidently thought at first, for it referred to "the ambiguity contained in the December 3, 1953 retainer between the phrase 'the funds deposited in Court' (which favors the Committee) and the language 'thirty-five (35%) per cent of all sums recovered by settlement, suit or otherwise' (which favors Shiya) . . . ." App. *infra* p. 13. Then, however, the Court stated that "by using 'claim' to refer to the fund, and 'litigation' to refer to the overall subject matter, the parties clearly manifested their intent that Shiya was retained to recover the fund but would receive 35% of all renewal royalties." That statement simply defies analysis.

in his hands an amount representing almost precisely 25% of the accrued royalties at the close of the litigation. Second, although during the next five years very substantial royalties were paid petitioner, respondent took no steps to enforce a claim to a share in that money. Third, even in the Basile letter of January 11, 1965 (*supra* p. 15), in which Basile stated that "the amount suggested by [respondent] previously is not considered enough," Basile stated only that respondent "considers that $85,000.00 in addition to the sum he received should take care of his demands and the demands of his assistants." As Judge Hays said, petitioner's position is supported by "Shiya's failure to assert any claim to renewal royalties paid to the Committee after termination of the Surrogate Court proceeding" (App. *infra* p. 10).

2. *Judicial authority to regulate the amount of contingent fees.* A second respect in which the lower courts departed from rules prevailing, not only in New York, but also in at least one other federal jurisdiction, relates to the authority of courts to test attorney's fees by the standard of reasonableness, not merely by ordinary rules of contract construction. As to this important question, the Court of Appeals for the Fourth Circuit has opted for broad judicial supervision. In *Maddox v. Fidelity Investment & Title Co.*, 300 F.2d 1, 3 (1962), the Court approved as "completely fair" to the plaintiff attorney a jury charge upon a contract claim under which the jury was instructed that "an attorney's agreements as to fees must be fair and reasonable, in view of the confidential relationship which exists between attorney and client," and that "if they found the agreements were not fair and reasonable, they should award the plaintiff such amount . . . that seemed to them to be fair and reasonable under all the evidence." The *Maddox* rule conforms both with the Canons of Ethics of the American Bar Association and the Canons of Ethics of the New York State Bar Association.[29] Moreover, with respect to the Court

[29]Canon 13 of both Associations provides: "A contract for a contingent fee, when sanctioned by law, should be reasonable under the

of Appeals' suggestion in the cast at bar that in any event the reasonableness of a fee may be judged exclusively by considering the percentage of the recovery that goes to the attorney, it may be noted that in *Maddox* the Court emphasized that there was "testimony in voluminous detail as to the work he had performed . . . ." *Id.*, at p. 4.

On the other hand, the Court of Appeals for the First Circuit agrees with the position taken by the lower courts in the case at bar. In *Bengoechea Macias v. De La Torre & Ramirez*, 84 F.2d 894, 896 (1st Cir. 1936), that Court held in an attorney-client case that the "sole question" was "whether or not there was such an agreement," and that if there was "no question of the reasonableness of the services could arise . . . ." If federal law is to govern in this type of case, this Court should resolve the dispute as to what that law is to be with respect to the obligation of federal courts to supervise contingent fee contracts.[30]

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circumstances of the case, including the risk and uncertainty of compensation, but should always be subject to the supervision of a Court as to its reasonableness."

[30]In *Maddox* and *Bengoechea*, it is unclear whether the courts were applying federal or local law on the point in issue.

CONCLUSION

This case presents significant questions relating both to the sensitive subject of competing federal-state interests, as that tension is reflected in the problem of choice of laws in federal court litigation, and to the important subject of attorney-client relations. Moreover, this case, involving as it does an enormous fee charged against a public charitable trust of a foreign country, provides an appropriate vehicle for this Court to consider these questions. Accordingly, petitioner requests that certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 420, 421—September Term, 1966.

(Argued May 11, 1967 Decided July 10, 1967.)

Docket Nos. 31072, 31073

In the Matter of the Application of

GEORGE G. SHIYA,

Petitioner-Appellee,

—v.—

THE NATIONAL COMMITTEE OF GIBRAN, also known as the COMITE NATIONAL DE GIBRAN, Representing the Town of Becharre, Lebanon,

Respondent-Appellant.

MARY K. GIBRAN and WILLIAM SAXE, as administrators c.t.a. of the Estate of KAHLIL GIBRAN, and MARY K. GIBRAN,

Plaintiffs,

—v.—

ALFRED A. KNOPF, INCORPORATED,

Defendant,

—v.—

THE NATIONAL COMMITTEE OF GIBRAN, also known as the COMITE NATIONAL DE GIBRAN, Representing the Town of Becharre, Lebanon,

Interpleaded Defendant.

Before:

SMITH, KAUFMAN and HAYS,

Circuit Judges.

Appeal from judgment of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Chief Judge,* awarding legal fees to counsel under retainer in copyright action. Affirmed.

JOSEPH M. CUNNINGHAM, New York, N. Y. (Philip G. Reilly, New York, N. Y., on the brief), *for appellee.*

JAMES F. SAMS of Reeves, Harrison, Sams & Revercomb, Washington, D. C. (James M. Ellis and Donovan, Leisure, Newton & Irvine, New York, N. Y., on the brief), *for appellant.*

SMITH, *Circuit Judge*:

The National Committee of Gibran appeals from a judgment of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Chief Judge,* which upheld attorney George G. Shiya's construction and interpretation of a contingent fee retainer entered into by the parties on November 1, 1956. The question to be resolved is whether Shiya is entitled to 25% of all the royalties from the renewal copyrights on seven works of the author Kahlil Gibran or to 25% of those royalties which had accrued at the termination of his services. We affirm Judge Ryan's decision that Shiya's retainer entitles him to 25% of all the renewal royalties.

Kahlil Gibran died in the United States in 1931. Under his will the royalties on the works in question were bequeathed to the town of his birth, Becharre, Lebanon. The appellant Committee, whose members are elected by the residents of Becharre, was formed to receive and distribute the royalties. When the original copyrights began to expire in 1946, Mary K. Gibran, the author's sister, filed renewal applications both personally and as administratrix of the Gibran estate. The Committee subsequently retained Shiya, who, after considerable litigation, secured the renewal rights for the Committee. See, *Gibran* v. *Alfred A. Knopf*, 153 F. Supp. 854 (S. D. N. Y. 1957), aff'd 255 F. 2d 151 (2d Cir.), cert. denied 358 U. S. 828 (1958). Subsequent proceedings in the Surrogate Court were concluded in 1960.

The negotiations which preceded the November 1, 1956 retainer occurred over more than four years and are evidenced by many documents and some oral testimony, none of which is challenged. In January 1953, in order to obtain payment of the renewal royalties, Mary Gibran filed suit in the Southern District against Alfred A. Knopf, Inc., the publisher of the works. Knopf interpleaded the Committee. Thereupon, the Lebanese Consul General in New York informed the Committee that it would need to appoint an attorney. Joseph Rahme, the president of the Committee, directed inquiries concerning the renewal rights to Dr. Naef K. Basile, a Lebanese-American from Becharre who practiced medicine in New York. Basile replied in April 1953 that "whoever will have the final award, will receive the money and all what shall come out as income from the books in the future" and that unless the Committee retained a vigorous attorney, "the money and whatever will follow then will no doubt go to Mariana." In June 1953, Rahme

granted a general power of attorney to Basile with the understanding that Basile would retain a lawyer.

In the following months, Basile consulted ten to twelve law firms, including Shiya's. Shiya proposed a 35% retainer if he paid expenses and a 25% retainer if the Committee paid expenses. While in Lebanon during July and August 1953, Basile discussed the hiring of a lawyer with Rahme who asserted that Shiya's proposal was too high and instructed Basile to interview additional lawyers. Upon his return to the United States, Basile contacted seven or eight more firms. Unable to locate a competent lawyer who would better Shiya's terms, Basile, on December 3, 1953, retained Shiya

> "to prosecute and adjust for me and for the said National Committee of Gibran, our claim for the funds deposited in Court by Alfred A. Knopf, Incorporated, in connection with the litigation now pending in the United States District Court, Southern District of New York, entitled:
>
> > Mary K. Gibran and William Saxe, as administrators c.t.a. of the Estate of Kahlil Gibran, and Mary K. Gibran, Plaintiffs, against Alfred A. Knopf, Incorporated, Defendant, against The National Committee of Gibran, et al., interpleaded Defendants.
>
> and I do hereby give you as my said attorney the exclusive right to take all legal steps to enforce my said claim and I hereby further agree not to settle this claim in any manner without your consent as attorney.
>
> In consideration of the services rendered and to be rendered by you as my attorney, I hereby agree to pay you, and you are authorized to retain out of any moneys that may come into your hands, thirty-five (35%)

per cent of all sums recovered by settlement, suit or otherwise for or on behalf of The National Committee of Gibran in the above described action, proceeding or litigation."

Shiya then commenced to render legal services for the Committee. During September and October 1954, Basile reported to Rahme on the progress of the litigation, commended the services that Shiya was rendering and stated that it was fortunate that Shiya had agreed to an exclusively contingent retainer. On January 15, 1955, in response to a query by Rahme about Shiya's fee, Basile stated:

> "When I was in Lebanon in the summer of 1953, we conferred together with respect to the fee of Mr. Shiya. I stated to you very clearly that the attorney had requested in the second matter that he receive twenty-five percent of all sums involved or connected with the litigation if you agreed to pay all expenses incidental thereto, or thirty-five percent if he pays all expenses. At that time I heard no objections from you whatsoever. Accordingly, on my return to New York I entered into an agreement with Mr. Shiya covering his fee based upon the terms presented to you."

Six months passed and on July 20, 1955, Rahme informed Basile that Lebanese law restricted retainers to 20% and that the members of the Committee would be surcharged for any excess they paid. Consequently, "in view of the fact that you have written to us to the effect that the lawyer has required thirty [sic] percent for his compensation of the monies that shall . . . be adjudged to inure to the benefit of the committee," Rahme requested Basile to persuade Shiya to accept a fee of 20%. Three months later, on October 29, Basile replied:

> "When I was in Lebanon and met with you and the committee, I presented to you in great detail and clarity what the attorney requested for his fee if he were to pay all expenses incident to the litigation or what his fee would be if you were to pay these expenses. Since there was agreement on your part as to his fee if he paid all expenses and you voiced no objection, I entered into a written retainer agreement with him. This prevailed until the receipt of your last letter and the letter of the committee addressed to Consul Shebea. Both contained comment that the fee fixed by attorney George Shiya is very high and not consistent with Lebanese practice."

Nevertheless, Basile continued, Shiya, "with great reluctance finally assented" to Shebea's suggestion of "a fee equal to twenty-five percent of the total recovery." Basile concluded as follows:

> "Because of the fact that the trial of the case will soon be reached, I found it advisable to write to you for an acknowledgment of Consul Shebea's letter. If you approve of what Consul Shebea and I have suggested and offered to Mr. Shiya, I shall renew my retainer agreement with him and the litigation will proceed in its regular course."

On November 21, 1955 the Committee accepted Basile's "suggestion that Mr. Shiya receive 25% as he requested for fees and the committee considers the 5% added to the 20% to be for expenses and dues incurred by the case." Two days later, Rahme authorized Basile "to enter into an agreement with Mr. Shiya fixing his compensation . . . at twenty-five percent of the recovery, with the remaining

seventy-five percent thereof payable to the committee, free and clear of all expenses of the litigation . . . " On the other hand, the Committee's Decision 88, dated November 20, 1955, which was not communicated to either Basile or Shiya, stated:

> The Secretary was instructed to write Dr. Basile on this decision and to affirm that the 25% is the fee only for the amount of money accumulated at the date of the final ruling on the case.

Almost a year had passed when, on September 8, 1956, Basile wrote Rahme that:

> "I was told by the court this week to present a photo copy of the agreement attached here for your signature and authentication by the American Consul. The agreement states exactly what you have accepted in writing. The lawyer will be paid 25% at the termination of the case and the Committee of Gibran will get 75%. The 25% will include all his fees if the case remains in New York.
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> • • • • •
>
> "Note: Twenty-five percent—till a final judgment is rendered from beginning and through appeal. He is responsible for all expenses of the case. Not clear. He is asking twenty-five percent at the beginning and twenty-five percent through appeal. It will be more correct to have a new agreement drafted by a lawyer who knows English."

The agreement attached provided as follows:

> "[Y]ou are entitled to receive as compensation for such services twenty-five per cent (25%) of all moneys

determined by the Court to be due to The National Committee of Gibran, also known as the Comite National de Gibran, and the said Court or any judge thereof is hereby authorized to provide in any appropriate judgment, decree or order in the said action that twenty-five per cent (25%) of all moneys on deposit in the Registry of said Court to the credit of the said action be paid directly to you, George G. Shiya, and that the remaining seventy-five per cent (75%) thereof be paid to The National Committee of Gibran, also known as Comite National de Gibran.

In view of the possibility of an appeal by one or the other of the parties to said action from the determination of the said District Court, it is our further understanding and it is agreed that you shall be entitled to receive as compensation for your services twenty-five per cent (25%) of all moneys due The National Committee of Gibran, also known as the Comite National de Gibran, at the time of the final determination of such appeal or appeals whether said moneys are on deposit in the Registry of the said Court or in the hands of Alfred A. Knopf, Incorporated, and the said Knopf is hereby authorized and directed to make such payment to you and to remit the remaining seventy-five per cent (75%) thereof to The National Committee of Gibran, also known as the Comite National de Gibran."

The Committee retorted on October 11, 1956 that the provisions of the attached agreement

"fully contradict the agreement which has been reached between the Committee and the attorney, Mr. Shiya. It was agreed between them that the committee pay him 25% of the frozen money in New York upon ter-

mination of the case there, or in any other city, till the final stages. The committee does not pay Mr. Shiya's fees or expenses if the case is not won.

Please inform the Committee regarding this subject and provide us with another agreement, according to our request to be signed by the proper authorities."

On November 1, 1956, the following retainer resulted:

"This letter will serve to confirm the agreement between us supplementing the written retainer forwarded to you in September for your signature before the American Consul in Beirut.

It is understood and agreed between us that the payment to me of the sum of 25% of the monies due and owing from Knopf to the Comite National De Gibran, will be made after the termination of the litigation in the U. S. District Court and any other court to which the case may be taken on appeal. Such payment is to be made to me only in the event that the final judgment in this case is rendered in favor of Comite National De Gibran.

It is also understood and agreed that the above compensation of 25% of monies due and owing from Knopf to Comite National De Gibran will include payment for services rendered by me in this matter, in addition to all expenses and disbursements incurred by my office in connection with the litigation of this matter and that I shall make no claim for such expenses and disbursements or compensation for services herein, in the event that final judgment herein is rendered against Comite National De Gibran . . ."

On June 24, 1957 the Committee wrote Basile to the effect that:

"The copy of the retainer agreement sent to the Committee does not agree with the substance of its basic agreement and that is 25% of the moneys withheld or blocked upon the date of the inception of the trial and not the moneys that are due or that shall become due as appears in your retainer agreement."

Both parties agree that the crucial document is the November 1, 1956 retainer. Judge Ryan concluded that this contract was not ambiguous and that it entitled Shiya to receive 25% of all the renewal royalties. Because this conclusion was based solely on the construction of a written document, it is freely reviewable by us on appeal. *United Nations Korean Reconstruction Agency* v. *Glass Prod. Methods, Inc.*, 291 F. 2d 168, 172 (1961). Cf. *Meyers* v. *Selznick Co.*, 373 F. 2d 218, 222 n. 2 (2d Cir. 1966).

We disagree with Judge Ryan's holding that the November 1, 1956 retainer is not ambiguous. The pivotal phrase is *"the payment to me* of the sum of 25% of the monies due and owing from Knopf to the Comite National De Gibran, *will be made after the termination of the litigation* . . ." ([Emphasis supplied.] In providing that 25% of the fund would be paid to Shiya at the termination of the litigation, the language is not ambiguous. The ambiguity lies instead in the fact that the phrase refers only to the time of payment, not to the time at which Shiya's rights are to be measured. While it is apparent that Shiya is entitled to 25% of all royalties accumulated at the termination of the litigation, it is not clear whether he is also owed 25% of future royalties.

Because the retainer is ambiguous, evidence of the circumstances surrounding its making is admissible.[1] See,

1 It has been repeatedly argued that courts should forthrightly abandon the prerequisite of finding ambiguity before admitting evidence of

e.g., *H. K. Porter Co.* v. *Wire Rope Corp.*, 367 F. 2d 653, 660-61 (8th Cir. 1966); *Boro Hall Corp.* v. *General Motors Corp.*, 164 F. 2d 770 (2d Cir. 1947); *Oil Trading Associates* v. *Texas City Ref.*, 201 F. Supp. 846, 849 (S. D. N. Y. 1962); *West Africa Nav., Ltd.* v. *Ore & Ferro Corp.*, 192 F. Supp. 651 (S. D. N. Y. 1960). The Committee does not challenge Basile's authority to retain Shiya; accordingly, the task on appeal is to examine the "surrounding circumstances" and determine the intention of the parties. Taking into account the "surrounding circumstances," however, we agree with Judge Ryan's conclusion as to what the contract covered.

Thus, while we do not agree that the November 1, 1956 retainer was totally lacking in ambiguity, we are convinced that Judge Ryan's interpretation of its essential meaning is correct. The prize sought in the litigation, for the conduct of which Shiya was hired on a fee which was to abide the outcome, was the full fruits of the renewal copyrights. References to the fund in court and Knopf's disposition of it are to but one stage of the renewal period. The Committee had second thoughts about the fairness of the basic agreement when the subject matter of the litigation proved far more valuable than had earlier appeared. And it is able to point to language which appears to limit the fee to a percentage of the funds in court at one or another stage, i.e., the 1955 correspondence contains various references to the sum from which the retainer is to be drawn. The January 15, 1955 letter from Basile to Rahme referred

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"surrounding circumstances." *United States* v. *Lennox Metal Mfg. Co.*, 225 F. 2d 302, 309-15 (2d Cir. 1955) (Frank, *J.*, concurring); 3 Corbin, Contracts §§542, 542A, 543 (1960), §§543A, 543AA, 543C (Pocket Part 1964); 9 Wigmore, Evidence §2470 (1940); McCormick, Evidence §219 (1954). Because we have here a case of clearcut ambiguity, there is no occasion to pass on those arguments.

to "all sums involved or connected with the litigation"; the July 20, 1955 letter from Rahme to Basile stated that Shiya had "required thirty percent for his compensation of the monies that shall be adjudged to inure to the benefit of the Committee"; the October 29, 1955 letter from Basile to Rahme reported that Shiya had assented to "a fee equal to twenty-five percent of the total recovery"; on November 23, 1955 Rahme authorized Basile to retain Shiya "at twenty-five percent of the recovery." All of these references are ambiguous; they can be read to refer either to the frozen royalties or to all the royalties. Although the parties were aware that all royalties were involved, it is argued that they limited Shiya's retainer to the frozen royalties; and therefore that the 1955 correspondence must be deemed to refer to the frozen fund. The use of the terms "all" and "total" may have been used to distinguish the moneys frozen at the termination of Shiya's services from the moneys frozen at the inception of his services (which, incidentally, is what Rahme's July 24, 1957 letter claimed the retainer to cover).

The September-October 1956 exchange, which led to the November 1, 1956 retainer, is also some support for the argument that the parties intended to limit Shiya's fee to a percentage of the funds frozen. Basile's September 8 letter states that Shiya "will be paid 25% at the termination of the case" which "will include *all* his fees if the case remains in New York." [Emphasis supplied.] "Twenty-five percent . . . till a final judgment is rendered from beginning and through appeal. He is asking twenty-five percent at the beginning and twenty-five percent *through* appeal." [Emphasis supplied.] This claim of Basile's understanding of the agreement is supported by the language of the attached retainer drafted by Shiya. The first paragraph provided that Shiya was entitled to twenty-five

percent "of all moneys determined by the Court to be due" and that the court was authorized to pay twenty-five percent "of all monies on deposit" to Shiya. The second paragraph entitled Shiya to twenty-five percent "of all monies *due*" the Committee *"at the time of the final determination"* of an appeal. [Emphasis supplied.] The Committee's reply supports this reading by stating that it was agreed "that the committee pay him 25% of the *frozen money* in New York upon termination of the case there, or in any other city, till the final stages." [Emphasis supplied.]

However, these arguments seem to us outweighed by the factors favoring the interpretation arrived at by Judge Ryan of the parties' meaning and intent at the time of the November 1, 1956 retainer.

It must be stressed initially that from the outset both Basile and Shiya were fully aware that the subject of the litigation was all the renewal royalties, not simply those "frozen" at the termination of Shiya's services. Keeping Basile's and Shiya's awareness about the subject of the suit in mind, the ambiguity contained in the December 3, 1953 retainer between the phrase "the funds deposited in Court" (which favors the Committee), and the language "thirty-five (35%) per cent of all sums recovered by settlement, suit or otherwise" (which favors Shiya), may well be resolved in favor of Shiya. Furthermore, by using "claim" to refer to the fund, and "litigation" to refer to the overall subject matter, the parties clearly manifested their intent that Shiya was retained to recover the fund but would receive 35% of all renewal royalties. Accordingly, the original retainer seems to have provided that Shiya would receive 35% of all the royalties.

Once the terms of the original agreement are established, the ambiguities in the 1955 correspondence resolve them-

selves in favor of Shiya. As set out above, the January 15, 1955 letter from Basile to Rahme referred to "all sums involved or connected with the litigation"; the July 20, 1955 letter from Rahme to Basile stated that Shiya had "requested thirty percent for his compensation of the monies that shall be adjudged to inure to the benefit of the committee"; the October 29, 1955 letter from Basile to Rahme reported that Shiya had assented to "a fee equal to twenty-five percent of the total recovery"; on November 23, 1955 Rahme authorized Basile to retain Shiya "at twenty-five percent of the recovery." Thus, the parties repeated the understanding that Shiya would receive 25% of all renewal royalties.

The September-October 1956 exchange, which preceded the November 1, 1956 retainer, is further indication of the parties' intent. The first paragraph of the retainer drafted by Shiya which was contained in Basile's letter of September 8 provided that Shiya was entitled to twenty-five percent "of all moneys determined by the Court to be due" and that the Court was authorized to pay twenty-five percent "of all moneys on deposit" to Shiya. Any ambiguity in this paragraph and in the following one which entitled Shiya to twenty-five percent "of all moneys due" the Committee "at the time of final determination" of any appeal can well be resolved in favor of Shiya. The Committee's reply of October 11, 1956, while referring to the "frozen money," is concerned more with the provisions that the retainer is contingent and that Shiya will pay expenses. The final retainer of November 1, 1956 only describes the time of payment and clarifies the concern about contingency and expenses. Judge Ryan had the advantage of observation of the actual negotiators of the agreement, Basile and Shiya on the stand, and credited their testimony. In this

he was justified. Furthermore, the form of retainer urged by the Committee would be unusual; it might encourage attorneys to employ dilatory techniques to prolong the proceedings and thereby augment their fees.

While the fee of Shiya is likely to be large in amount, it is so only because the subject of the litigation, title to which he succeeded in confirming for the Committee, turned out to be of substantial value. Had the Court held that there was no meeting of the minds on amount, an award of 25% of the value of the recovery in *quantum meruit* would not be extravagant.

Judgment affirmed.

HAYS, *Circuit Judge* (dissenting):

It seems to me that the minimum which should be required of a lawyer in relation to his client is that he make clear how much his fee is going to be. The majority concedes that Shiya left the terms of his retainer ambiguous. While I would consider this to be enough to justify denying Shiya the recovery he seeks, I believe that the Committee's interpretation of their agreement is in fact the correct interpretation.

The principal question is the meaning of the phrase "25% of the monies due and owing from Knopf to the Comite" in Shiya's letter of November 1, 1956. The letter prepared by Shiya for Rahme's signature indicates that Shiva's 25% interest was intended to apply only to royalties accrued to the date of termination of the action, including any appeal. Basile's postscript to his September 8th letter ("He is asking twenty-five percent at the beginning and twenty-five percent through appeal") and Rahme's letter of October 11th ("It was agreed between them that the committee

pay him 25% of the frozen money in New York upon termination of the case . . . . "), support this view as does Shiya's failure to assert any claim to renewal royalties paid to the Committee after termination of the Surrogate Court proceedings.

If any ambiguity remains as to the meaning of the phrase "due and owing" in the November 1st letter, it ought to be construed against Shiya who could easily have avoided any difficulty by providing clearly for a 25% interest in the future royalties.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of July, one thousand nine hundred and sixty-seven.

Present: The Hons. J. Joseph Smith, Irving R. Kaufman, and Paul R. Hays.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellee.

A. DANIEL FUSARO
Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Findings of Fact and Conclusions of Law

This proceeding (65 Civ. 1303) having been tried by the Court without a jury and the Court having heard the evidence and considered the stipulations of the parties, finds the facts and states the conclusions of law as follows:

Findings of Fact

1. Kahlil Gibran was born in the Town of Bechari, in the Republic of Lebanon and emigrated to the United States of America.

2. Kahlil Gibran was the author and owned at his death the copyrights of the following books, having the following expiration dates for the original term of the copyrights:

Names	Dates
The Madman, His Parables and Poems	September 28, 1946
Twenty Drawings	September 27, 1947
The Forerunner, His Parables and Poems	September 15, 1948
The Prophet	September 28, 1951
Sand and Foam	October 5, 1954
Jesus Son of Man	October 12, 1956
The Earth Gods	March 14, 1959

3. He died a citizen of the United States of America, a resident of the County of New York, on the 12th day of April, 1931, leaving a personally drafted Last Will and Testament which failed to nominate an Executor.

4. Under the terms of Kahlil Gibran's Last Will and Testament, the royalties on the testator's copyrights were bequeathed to his home-town of Bechari in the Republic of Lebanon.

5. Upon the expiration of the aforementioned copyrights, between September 28th, 1946 and September 28th, 1951, renewal applications were filed by Mary K. Gibran, individually, and Mary K. Gibran and William Saxe, as administrators, c.t.a. of the Gibran estate.

6. Petitioner is an attorney at law, admitted to practice in the State of New York, this Court, the Court of Appeals for the Second Circuit and the Supreme Court of the United States.

7. By Power of Attorney dated June 3, 1953, Naef K. Basile, M.D. was appointed by Respondent as Attorney in Fact to represent the Respondent's interest in the United States.

8. According to the powers granted him in said Power of Attorney, Naef K. Basile, M.D. retained Petitioner George G. Shiya, by a contract in writing dated December 3, 1953.

9. Said contract called for the Petitioner to represent the Respondent in prosecuting its claim to the renewal copyrights of the aforementioned works of the author, Kahlil Gibran, in return for which he was to receive thirty-five percent of all monies due and owing to the Respondent from Alfred A. Knopf, Incorporated, arising from the use of the renewal copyrights on condition that the Petitioner succeeded in recovering for Respondent a right to the renewal copyrights.

10. According to the terms of the said contract of December 3, 1953, Petitioner performed valuable legal services extending over twelve years which finally resulted in a judgment assigning said renewal copyrights to the Respondent.

11. On November 1, 1956 the Petitioner voluntarily modified the contract of retainer dated December 3, 1953, in that he entered into a new written contract with Respond-

ent by which the percentage of his compensation was reduced from thirty-five per cent (35%) to twenty-five percent (25%) of the monies due and owing to the Respondent from Alfred A. Knopf, Incorporated, arising from the said renewal copyrights.

12. The contract of November 1, 1956 was executed and entered into by both the Petitioner and the Respondent by their free and voluntary acts.

13. The sum of $44,346.45 was paid and advanced to the Petitioner by Naef K. Basile, M.D., Attorney in Fact for the Respondent on account for his legal services in obtaining for Respondent the right to the ownership of said renewal copyrights.

14. This sum was advanced by Naef K. Basile, M.D. in accordance with his authority as Attorney in Fact for the Respondent.

15. Petitioner was at no time guilty of any unprofessional conduct, breach of professional ethics, or overreaching but rendered faithful, and most valuable legal services to the Respondent.

16. Up to the present, the Respondent has not performed its part of the contract of November 1, 1956, in that it has not, except for the sum of $44,346.45, compensated the Petitioner for his services in obtaining the rights to the renewal copyrights in accordance with the terms of the contract.

Conclusions of Law

1. The contract of retainer dated November 1, 1956 was valid, and binding upon the Petitioner and Respondent.

2. The contract of retainer of November 1, 1956 was not ambiguous in its terms.

3. According to the terms of the retainer, the Petitioner is entitled to twenty-five per cent (25%) of all monies due or to become due to the Respondent because of the earnings on the renewal copyrights for the entire life of the renewal copyrights on each of the said works of Kahlil Gibran from the date of their renewal until the final expiration of these renewal copyrights.

4. In accordance with the terms of the said contract, Petitioner is presently entitled to twenty-five per cent (25%) of the monies that have been earned to date upon said renewal copyrights.

IT IS SO ORDERED

SYLVESTER J. RYAN
U.S.D.J.

Dated: New York, New York
December 6th, 1966

In the Matter of the Application of GEORGE G. SHIVA etc. GIBRAN et al. v. ALFRED A. KNOPF, INC. v. THE NATIONAL COMMITTEE OF GIBRAN

Endorsement
65 Civ. 1303
Civ. 82-18

The within findings and conclusions proposed by Petitioner, with minor corrections made, have been signed. They are substantially a restatement of the findings and conclusions stated by me on the record at the end of the trial. While unnecessary, they appear desirable in that a formal statement may be of help to an appellate court.

SYLVESTER J. RYAN
U.S.D.J.

Dated: December 6, 1966.

		Charges To Account	The Madman	The Forerunner	The Prophet	Sand And Foam	Jesus Son of Man	Earth Gods	Total	
			$	$	$	$	$	$		
Renewal	9/28/46—10/31/52		2,261.85							
"	9/15/48— "			890.76						
"	9/28/51— "				18,365.97					
Roy. Period	11/1/52—4/30/55		648.00	462.60	43,816.12					
"	5/1/55—10/31/55		171.68	120.94	9,984.60					
"	11/1/55—10/31/56		311.40	214.27	21,718.12					
Renewal	10/5/54— "					1,745.43				
"	10/12/56— "						46.14			
Roy. Period	11/1/56—4/30/57		171.95	114.30	11,271.01	463.12	751.03			
"	6 mo. ended—10/31/57		221.60	175.80	14,387.39	553.29	712.42			
"	" —4/30/58		177.04	91.35	12,532.33	492.99	768.90			
"	" —10/31/58		252.00	218.40	16.027.31	580.80	771.75			
Renewal	3/31/59—4/30/59							11.90		
Roy. Period	6 mo. ended—4/30/59		229.52	119.71	15,119.56	618.12	790.89			
"	" —10/31/59		267.38	188.48	19,727.28	677.33	721.82	137.76		
"	11/1/59—3/31/60		215.64	139.73	13,437.93	573.05	708.15	79.13		
Roy. Period	4/1/60—4/30/60		37.28	24.68	2,976.37	83.21	133.50	16.45	$215,247.04	(A)
"	6 mo. ended—10/31/60		274.09	174.40	22,032.62	817.90	874.79	113.82		
"	" —4/30/61		433.13	314.17	23,456.35	879.80	1,089.67	227.09		
"	" —10/31/61		380.63	277.21	25,650.80	1,064.96	995.93	174.30		
"	" —4/30/62		576.25	301.88	32,237.45	1,327.64	1,359.86	202.65		
"	" —10/31/62		477.59	343.33	36,195.62	1,288.73	1,357.99	226.21		
"	" —3/31/63		486.15	357.00	35,626.34	1,555.82	1,230.04	262.06		
Roy. Period	" —9/30/63		654.39	290.86	40,811.56	1,077.91	1,527.79	321.74	$197,915.76	(B)
"	" —3/31/64		896.50	861.16	53,259.53	2,966.57	2,055.37	481.38	44,684.25	(B)
"	" —9/30/64		785.09	623.86	55,730.61	1,913.82	1,818.54	417.73	60,520.51	(B)
Roy. Period	" —3/31/65		1,210.28	924.77	64,403.39	3,537.31	2,654.89	637.26	61,289.65	(B)
"	" —9/30/65	($4.78)	1,348.46	1,084.64	72,845.05	3,797.26	2,643.10	713.16	$ 73,367.90	(C)
"	" —3/31/66		2,024.13	1,544.41	84,361.26	5,033.43	2,422.68	951.32	82,426.89	(C)
									96,337.23	(C)
		($4.78)	$14,512.03	$9,849.71	$745,974.57	$31,048.49	$25,435.25	$4,973.96	$831,789.23	

(1)
A—paid to US District Court—$113,529.29

(2)
Mary K. Gibran & William Saxe-admin. $101,717.75

B—paid to Comite National Gibran—$364,410.17
C—Not paid—$252,132.02

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 776

THE NATIONAL COMMITTEE OF GIBRAN, also known as THE COMITE NATIONAL DE GIBRAN, representing THE TOWN OF BECHARRE, LEBANON, *Petitioner*,

v.

GEORGE G. SHIYA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION OF THE REPUBLIC OF LEBANON FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The Republic of Lebanon moves this honorable Court for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari filed in the above action.

Counsel for the petitioner has consented to the filing of this brief, but counsel for the respondent has refused consent. Accordingly, this motion is brought pursuant to Rule 42 of the Court's Revised Rules.

Lebanon's substantial interest in this case, and reasons for its support of petitioner's position herein, are set forth in the attached brief.

Respectfully submitted,

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Republic of Lebanon
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Washington, D. C. 20036

WORTH ROWLEY, ESQ.
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 776

THE NATIONAL COMMITTEE OF GIBRAN, also known as THE COMITE NATIONAL DE GIBRAN, representing THE TOWN OF BECHARRE, LEBANON, *Petitioner*,

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BRIEF OF THE REPUBLIC OF LEBANON IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

This case is of considerable importance to the Government of Lebanon, and accordingly the Government wishes to support fully the petition for a writ of certiorari filed by the National Committee of Gibran. As we indicate in more detail below, the Committee is a

public administrative board operating under the supervision of the Government and is responsible for administering the bequest of Kahlil Gibran for the benefit of Becharre, a political subdivision of the Government. The purposes that are served by the Gibran Trust are important public purposes which will be adversely affected if the lower Court's decision is not reversed.

THE NATURE OF THE INTEREST OF THE REPUBLIC OF LEBANON

The Government's interest in this case is rooted in three considerations: the institutional relationship of the petitioner to the Government; the charitable public purposes for which the Committee expends the copyright royalties arising from the Gibran bequest; and the fact that, because of the unique status enjoyed by Kahlil Gibran in Lebanon, litigation involving a major share in the copyrights to his works commands the special attention of the people and the Government of Lebanon.

1. Institutional Relationship of the Petitioner to the Government.

The town of Becharre is a political subdivision of the central Government of Lebanon. Unlike a federal system of government wherein state and municipal governments enjoy a relatively high degree of autonomy, the Lebanese system is highly centralized. Lebanon is divided into five regions for administrative purposes. One of them is Northern Lebanon where Becharre is situated. Those regions are further subdivided into various districts and municipalities such as Becharre, and all are under the direct jurisdiction of the central Government, a jurisdiction exercised through the Ministry of Interior.

Thus, the Gibran Trust, although limited to public charitable purposes for the benefit of Becharre, is under the jurisdiction of the Ministry of Interior. In 1935, the Ministry authorized the establishment of the National Committee of Gibran to carry out the terms of Gibran's bequest. The Committee, as a public board of trustees, represents Becharre and administers the Gibran Trust for the benefit of its inhabitants, but always remains under the supervision and control of the central Government. The Committee's status as a "political subdivision of a foreign government [Lebanon]" was recognized in 1936 by the Internal Revenue Service of the United States when it granted tax exempt status to the Committee. (App. p. 74a).[1]

Upon expiration of the term of office of the previous Committee over which Joseph G. Rahme presided, and pursuant to a recent Decree issued by the Council of Ministers and signed by the President of the Republic, a Provisional Committee has been named to revise the Committee's Constitution. The Chairman of this Committee is the Minister of Interior, and its members include the Governor of Northern Lebanon and the President of the Municipality of Becharre.

2. Charitable Projects Administered by the Committee.

The 1931 Gibran bequest has provided enormous benefits to the town of Becharre. Although by United States' standards, the amounts involved may not seem great, by Lebanese standards, and more particularly the town of Becharre, the royalties are substantial indeed.

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[1] Citation is to the Appendix filed by petitioner in the Court of Appeals. Citations to the record appear as "R".

The population of Becharre is now approximately 3,500. The town, which is situated high in the mountains of Northern Lebanon, is an agricultural community in which there is little opportunity for employment. The per capita income in Lebanon is approximately $400.00 per year. While that is low enough, the per capita income in Becharre is only half that of the national average and ranges from $175.00 to $200.00 per year.[2] The Gibran royalties of $170,373.20 during 1966, if pro rated among residents of Becharre, represent a per capita income of approximately $50.00 or 25% of the total per capita income (App. p. 76a). Accordingly, the amount here in litigation—25% of the royalties—amounted in 1966 to 6¼% of the *total income* of Becharre.

The public purposes to which the royalties have been placed are of great importance to the community. A substantial portion of the royalties have been allocated to fund a medical clinic for needy residents of the town. This medical clinic represents the sole source of medical aid available to those residents who cannot afford to travel to larger coastal cities such as Beirut or Tripoli for treatment. The clinic also administers innoculations and operates a program of preventive care of substantial benefit to the community.

The churches of Becharre have played an important role in administering welfare programs for the benefit of needy families. A substantial part of the cost of such projects has been shared by the Committee either by contributions to the churches or by direct aid. Thus food, clothing and other essentials have been made

[2] Figures are estimates provided by the Economic Counselor, Embassy of Lebanon, Washington, D. C., based upon Government statistics.

available to a number of poorer residents of the town as a direct result of the Gibran royalties.

The project having the greatest long-range significance, however, is the scholarship program funded by the Gibran royalties. A substantial number of scholarships have been awarded to qualified and needy students enabling them to pursue their studies at the university level in Beirut. Funds have also been made available to permit other students to obtain vocational training at various centers located in Lebanon. The benefits derived from such a program within a "developing nation" such as Lebanon are very significant. The opportunity to obtain a university education or specialized vocational training made available to Becharre students has made it possible for them to ultimately obtain positions based upon their native ability rather than their economic status. The very existence of the program has provided encouragement to all students to pursue their studies more vigorously so that they might qualify for aid. The cost of university education or vocational training in Lebanon is, of course, much less than in the United States. Consequently, a budget of fifty thousand dollars per year for a scholarship program can benefit as many as one hundred students.

A museum in which the art of Kahlil Gibran is displayed is also funded by the royalty income. This museum has become a significant tourist attraction, and cultural programs organized under its auspices have greatly enriched all of Lebanon as well as the local community.

The great importance of the Gibran royalties was graphically, and tragically, demonstrated when re-

spondent initiated legal proceedings in the trial Court. Respondent, prior to the time petitioner obtained legal counsel, sought and obtained an injunction restraining the publisher from sending *all* royalty income to Lebanon pending final determination of the case. As a result of the injunction, the Committee was forced to abandon most of the above described projects and sharply curtail others.

3. National Importance of the Gibran Trust

The foregoing statement indicates the measurable interest of the Government in this litigation. We hope that interest is a sufficient basis for the motion to file a brief as *amicus curiae*. The Government cannot, however, fully discharge its representative responsibilities without noting another source of its interest in the case—a source that is, to be sure, intangible, but that is nonetheless of genuine significance to the people of Lebanon. Kahlil Gibran has become an important figure in Lebanese tradition. His literary accomplishments in Lebanon and the United States are, of course, a source of immense pride to the people of Lebanon. But more significantly, his qualities as a philosopher and humanist have inspired the love and admiration of his former countrymen.

Accordingly, the Government of Lebanon is intensely interested in retaining, to the extent consistent with the law of the United States, full ownership of the corpus of Gibran's Trust so that it remains exclusively public in character as intended by the author. The lower Court's decision is so greatly at odds with that interest, and with prevailing legal authorities in the United States as pointed out by Petitioner, that the Government appeals to this Court to grant review so

that the decision may be subjected to scrutiny at the highest judicial level.

ARGUMENT

The Government adopts the reasons advanced by the petitioner for the grant of certiorari. While the Government believes that those reasons are both primary and compelling, it respectfully suggests other considerations that are relevant and that pertain particularly to the Government's interest.

A. Contracts Affecting the Public Interest When Capable of More Than One Construction Should Be Construed Liberally in Favor of the Public.

The lower Courts apparently overlooked the public interest factors involved in the contract and issues raised thereunder. The public nature of the trust administered by the Committee was fully established in the lower courts. Yet the Court of Appeals, after concluding that both the contract and "surrounding circumstances" were ambiguous, proceeded to resolve those ambiguities in favor of the private interests of respondent and against the public interests of petitioner.

Substantial authority exists in support of a rule of construction that where the language of a contract is "*fairly susceptible of more than one interpretation, agreements affecting the public and agreements with a governmental body on behalf of the public are construed in favor of the public.*"[3] The Restatement of

[3] 17 Am. Jur. 2d § 288, at p. 703. See e.g., *Joy* v. *St. Louis*, 138 U.S. 1; *Larson* v. *South Dakota*, 278 U.S. 429, citing, *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, (holding public grants are to be strictly construed and nothing passes by implication).

Contracts (1932 Ed.) § 236(f) states that *"where a public interest is affected, an interpretation is preferred which favors the public."* See also Williston, Contracts (3rd Ed. 1961) § 626, p. 842. *"Grants of franchises and contracts or agreements affecting the public interest are to be construed liberally in favor of the public."*

Perhap the best statement of the principle is set forth in Corbin, Contracts (1960 Ed.) Ch. 24 § 550, pp. 194-196:

> *"It is very commonly stated, in the guise of a rule of interpretation that public contracts and other contracts by which the public interest is affected shall be 'construed' in the manner most favorable to the public . . . Perhaps this rule is most often stated and applied to public franchises and agreements for tax exemption, but it is not restricted to them. It seems more accurate, however, to describe this rule as a rule of construction rather than one of interpretation, one that for reasons of public policy requires the court to give to a contract that legal operation that is of public advantage, when a choice between that and a less advantageous operation is reasonably open. The choice is between legal effects rather than between alternative meanings that one or both of the parties gave to their words . . ."*

In *Irwin et al.* v. *Swinney et al.*, 45 F. 2d 890 (WD Mo., 1930), the court applied principles that are relevant here. As in the case at bar, *Irwin* involved an action by attorneys to recover fees for services performed in defeating a challenge to a public charitable trust established for the benefit of a municipality—Kansas City, Missouri. The Court observed that the

judiciary should be *"ever zealous to protect from any but clearly just demands, all trusts which for the time may be in its control, and especially trusts like this, which are designed for the general promotion of human welfare."* Moreover, in fixing attorneys' fees, the Court pointed out that *"[p]ublic service generally receives and should receive a smaller measure of pecuniary compensation than that which is rendered to private persons."*

B. The Court of Appeals Decision Overlooks Respondent's Breach of Duty to Petitioner.

In arriving at its decision, the majority of the Court below imputed an intent on the part of the petitioner to, in effect, assign a 25% interest in the corpus of the Gibran Trust to respondent. We think that decision plainly wrong for the reasons stated by petitioner and by the dissenting judge. We should like merely to underscore two relevant considerations.

First, the members of the Committee are charged with an enormous public responsibility, and it is incredible that they would have assigned such a valuable interest to respondent with the entire lack of precision reflected by the contract and correspondence—both of which the Court below found ambiguous.

Second, respondent was dealing, as he well knew, with clients who were not familiar with the English language or with the substantive and procedural law of the United States. Accordingly, respondent's duty to "make plain the terms of his compensation" as Judge Hays pointed out should have been especially clear and stringently applied.

C. Relevancy of Interest of Amicus Curiae.

Although under factual circumstances quite different from the instant case, this Court has on previous occasion indicated willingness to grant certiorari where a state expresses interest in a controversy. Thus, in *State of New York* v. *United States*, 326 U.S. 572 this Court stated that "*[t]he strong urging of New York for further clarification of the amenability of states to the taxing power of the United States led us to grant certiorari.*" And in *Group No. 1 Oil Corporation* v. *Bass*, 283 U.S. 279, the Court, after first denying certiorari, reversed itself after the State of Texas joined in support of an application for rehearing.

In light of the Court's views regarding a state's expression of interest in a case as a factor influencing its decision to grant certiorari, Lebanon would urge the Court to adopt a similar view with respect to cases in which a foreign nation has expressed interest due to the similarity of the policy considerations involved.

CONCLUSION

The Government is aware that, under the principles governing review by this Court, it is not sufficient that the lower Court's decision constitutes a miscarriage of justice—as the Government believes that it did. But the Government is hopeful that the grounds advanced by the petitioner, as supplemented in this *Amicus* Brief, will meet this Court's standards, and that accordingly, review of this case, so important to the people of Lebanon, will be granted by the highest tribunal of this land. Those grounds are, we respectfully suggest, most substantial. The issues in this case involve the most fundamental principles applicable to the attorney-client relationship and to the attorney's

duties and responsibilities in dealing with matters of public interest, both domestic and foreign. In view of this Court's important role in supervising attorneys in the conduct of litigation in federal courts, we submit that these issues fully deserve the attention of this Court, and accordingly, we urge that the petition for a writ of certiorari be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 776

THE NATIONAL COMMITTEE OF GIBRAN, also known as THE COMITE NATIONAL DE GIBRAN, representing the Town of Becharre, Lebanon,

Petitioner,

v.

GEORGE G. SHIYA,

Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

No. 776

THE NATIONAL COMMITTEE OF GIBRAN, also known as THE COMITE NATIONAL DE GIBRAN, representing the Town of Becharre, Lebanon,

Petitioner,

v.

GEORGE G. SHIYA,

Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI

Statement

The petition for certiorari attempts to create questions from issues which never existed in this litigation either in the District Court or in the Court of Appeals. Indeed, such issues were not raised by either side until raised in the petition.

The questions contained in the petition are frivolous and induced by the petitioner's realization that the only real issues decided below were disputed questions of fact and of contract interpretation. All such issues were decided against petitioner by former Chief Judge Ryan of the Southern District of New York and by the Court of Appeals.

Whether federal or state law applied to any issue was never raised in the courts below. Both parties agreed that

federal and state law were the same on the issues involved. Both parties agreed that the law on interpretation of attorneys' contingent fee contracts is virtually the same in all jurisdictions, both federal and state.

The most appropriate statement in New York law describing the attitude of the petitioner is found in *Matter of the City of New York,* 148 Misc. 488, at page 495; aff'd 239 App. Div. 775 (1933), where the court said:

> "It is not infrequent for clients to show a willingness to accept the full benefits of attorneys' successful efforts who have been retained upon a contingent basis and attempt to repudiate a contingent agreement because the result of the litigation exceeded their expectations."

POINT I

No question of whether federal or state law applied was raised in the District Court or in the Court of Appeals. Both parties agreed there was no conflict and that a well established general law applied.

Attorney George G. Shiya sought relief in the District Court pursuant to the Judiciary Law of the State of New York to recover his fee earned after 12 years of litigation.*

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* The relevant portions of Section 474 of the New York Judiciary Law are:

> "The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law, except that no agreement made hereafter between an attorney and a guardian of an infant for the compensation of such attorney, dependent upon the success of the prosecution by said attorney of a claim belonging to said infant, or by which such attorney is to receive a percentage of any recovery or award in behalf of such infant or a sum equal to a percentage of any such recovery or award, shall be valid or enforceable unless made as hereinafter provided. * * *"

The entire structure of the petition is based on an assertion that although the petitioner requested that the District Court apply New York rather than Federal law, Chief Judge Ryan refused to apply New York law. In fact, petitioner never once requested that State law be applied either in its brief on trial or in its brief or oral argument to the Court of Appeals. Neither Judge Ryan nor the Court of Appeals refused to apply New York law.

The most obvious attempt by the petitioner to create an unfounded issue as a basis for granting certiorari is the truncated quotation from Judge Ryan's colloquy, at page 17 of the petition. Judge Ryan made this statement after the evidence had been completed, and before closing argument. It was made without a request by either party.

Immediately after stating that he would be guided by Federal law, Judge Ryan continued, in the same paragraph:

> "However, *I think the Federal Law on this is substantially as set forth in the New York State Judiciary Law* and that the jurisdiction of this Court is for the fixation of fees earned in the particular litigation filed in this Court and does not extend to other matters and does not extend to the enforcement of a general attorney's lien." (Emphasis added) (116b)

Mr. Sams, attorney for petitioner in this Court, who was also trial counsel, did not disagree with Judge Ryan but rather indicated agreement with the trial court's statement by merely saying:

> "Mr. Sams: Thank you, your Honor."

There is not one word in the many briefs submitted in the District Court on the question of whether Federal and State law should govern any issue. Nowhere in any brief in the Court of Appeals was any reference made, in any context, to the claim that the District Court "erred" in applying federal law. Petitioner realized then as it

does now that no question was before the lower courts on this subject. Petitioner's position in the District Court and in the Court of Appeals was that interpretation and rules of construction of attorney client contracts were treated in the same manner by federal and state authorities.*

Both parties in the District Court and in the Court of Appeals relied on New York cases. The decision of Chief Judge Ryan and opinion of the Court of Appeals were made after examining briefs in which New York cases were in the great majority. These briefs made no claim or even an oblique reference to any question of whether federal or state law should be applied to any issue.

In *Ellis* v. *Dixon*, 349 U. S. 458 (1954), this Court dismissed a writ of certiorari as being improvidently granted where an issue of constitutionality had not been properly raised below. The reasoning of the *Ellis* case applies here.

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* In addition to the fact that petitioner never alluded to a question of choice of law in the courts below, proof of lack of such question may be found in the cases cited to the courts below.

In respondent Shiya's trial brief was cited, Section 474 of the New York State Judiciary Law; 18 New York cases, 3 United States Court cases on general law, 1 Federal case which referred to the application of New Jersey law and 1 case from another state (New Jersey).

In the petitioner's brief in the District Court: the New York Judiciary Law was also cited, there were 31 New York cases cited for various points; 8 Federal cases citing general law and 4 cases of other states.

In respondent Shiya's brief in the Court of Appeals: The New York State Canons of Legal Ethics, 17 New York cases, 2 United States cases citing general law, 1 Federal case referring to New Jersey law and 4 cases from other states.

In the brief of the petitioner in the Court of Appeals: The New York Canons of Ethics; an extract from the New York State Bar Journal, 9 New York cases and 7 Federal cases, as well as quotations from authors Corbin and Williston, and from the Restatement of the Law of Contracts.

The claim of public importance in the petition is actually a verbal smoke screen. The record below is bare of any basis for such claim. The petition is merely an attempt to obscure the fact that all that is involved in this case are academic and episodic issues. The petition has attempted to manufacture a surface appearance of national importance. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 77 (1954).

Certiorari should be denied when the record does not present the questions tendered in the petition. *Needelman* v. *United States*, 362 U. S. 600 (1959). It is the primary business of the courts of appeal to make a final determination of questions of fact and law relating to issues in cases where no national importance is involved.

POINT II

There is no significant difference in the law applied by the various states and by federal courts concerning interpretation and rules of construction of attorneys' contingent fee contracts. The law of the State of New York does not differ from that applied by other states and by federal courts.

A.

Although the verbal formula may differ from case to case, there exists a well settled general law concerning a court's right to oversee an attorney's fee in a contingent retainer where fraud is present or the retainer is unconscionable.

In further support of the petition's theme that the petitioner was prejudiced by the "refusal" of the courts below to apply New York law, the petition seeks to give the impression that New York Courts are more likely to refuse to enforce a contingent fee retainer which is "unreasonable" than do other states. The conclusion of the petition is, therefore, that had New York law been applied, the

Shiya retainer would have been disallowed. Actually, the law of the State of New York on this point is similar to the general law applied in all other jurisdictions.

The principal case relied on by the petitioner for this proposition is *Gair* v. *Peck*, 6 N. Y. 2d 97 (1959), appeal dismissed and cert. den. 361 U. S. 374.

The *"Gair"* case held that the New York Supreme Court had the power to promulgate and enforce a schedule of fees governing contingent fee retainers in personal injury and wrongful death cases. The need for such schedule came about because in the New York negligence field the remuneration of the contingent fee lawyer had become magnified whereas the risk of loss to the lawyer was being continuously reduced.

In the *"Gair"* case, the New York Court of Appeals held that the schedule of contingent fees was not intended to and did not in fact regulate attorneys' fees in any different manner than did Section 474 of the New York Judiciary Law (p. 2 note). In its opinion, after pointing out (6 N. Y. 2d 97, at page 106) that a contingent fee may be examined if it is all out of proportion to the value of the professional services rendered (quoted at p. 20 of petition) the court made it clear that the word "unreasonable" was being used in the sense of "unconscionable", for as the court said, "It matters little whether under such circumstances the formula be that the size of the fee becomes 'unconscionable' or 'unreasonable'. Each word means the same thing in this context."

The New York Court of Appeals in *"Gair"* was fully familiar with the many cases construing the New York Judiciary Law Section 474 to mean that a retainer contract is valid in the absence of fraud or mistake; see for example, *Ransom* v. *Ransom*, 147 App. Div. 835 (1911) and *Sea Isle Foods Inc.* v. *State*, 40 Misc. 2d 872 (Court of Claims), 244 N.Y.S. 2d 613. The same rule persists in New York Law after the *Gair* opinion was written. *La Monte*

v. *Shapiro*, 254 N.Y.S. 2d 887 (1964). This familiar rule is firmly rooted in American Jurisprudence sec. 7 C.J.S. sec. 186 (p. 1062). The "*Gair*" opinion demonstrates such familiarity for it uses words to explain its meaning throughout its opinion as "unfair advantage", "fraud", "unlawful", "oppression and overreaching", "so excessive as to become unconscionable as a matter of law". In each instance the "reasonableness" of the retainer is tested at the time of making not after an unforeseen event gives both client and attorney a greater amount than originally contemplated.

The petitioner would ignore the fact that *Gair* v. *Peck* was not meant to and did not have any effect on the well-established New York law as expressed in *Matter of Mason*, 174 Misc. 218 (Surrogate's Court, Kings County, 1940), where the court said at page 222 in discussing a lawyer's retainer.

> "Since both of the parties were competent adults, it was open to them to fix this remuneration in advance, and in the absence of inequitable dealings in the inception of the contract, a court of general jurisdiction would presumably enforce it according to its terms (*Ward* v. *Orsini*, 243 N. Y. 123, 127; *Rodkinson* v. *Haecker*, 248 N. Y. 480, 489; *Matter of Pagnatta*, 161 Misc. 415, 418, 419; *Matter of Dugan*, 147 Misc. 776, 780; *Matter of Merrill*, 165 Misc. 295, 296), since, as a general principle, the courts will not concern themselves with the terms of a contract if fairly attained."

Section 474 of the New York Judiciary Law (See note 1, p. 2) expresses the same New York Law.

The schedules of the New York Supreme Court referred to in the "*Gair*" case, of course, applies only to contingent fee contracts in negligence cases and contrary to the implication in the petition, any fee of 25% of an amount over $25,000 is approved by this schedule regardless of the

amount involved or the manner in which the fee was earned, always absent fraud or overreaching on the part of the lawyer.

Diligent research has failed to disclose any case in any jurisdiction which differs from this general rule. It is true that not all courts use the same rules to formulate the rule. Some courts may use "exorbitant," "unfair advantage," some courts may use the word "unreasonable" to mean unconscionable as did the *Gair* v. *Peck* opinion.

Because of the posture of the law, it is very understandable that federal opinions in this area do not labor over choice of law nor refinements in the verbal formula of unconscionable, unreasonable, unfair, etc.

For instance, most of the federal cases cited by the petitioner, page 19, note 14 of the petition, apply the law of the state in which the Federal court was sitting. However, all of these cases make reference to the same general rules of law pertaining to the construction of contingent fee contracts whether the opinion cites local state law or cases from other sources. (See, for example, *Powell* v. *Pennsylvania Railroad Co.*, 267 Fed. 2d 241, 3 Cir. (1959).)*

The decisions in the Court of Appeals for the Second Circuit are fully in accord with the law of New York and, therefore, with the general law. In *Matter of Kuflik*, 342 Fed. 2d 421 (1965), the same Chief Judge Ryan, who was trial judge in this case, refused to award an attorney an amount due under a contingent fee retainer because that attorney had been disbarred for conduct unconnected with the work he had done in the *"Kuflik"* matter. The Court

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* Of the cases cited by petitioner at note 14, page 19, none went to this court. In three cases, unsuccessful attempts were made, *Lehigh* v. *N. E. R. Co.* v. *Finnerty*, 61 F. 2d 289 (1932), cert. den. 287 U. S. 668; *Byram* v. *Miner*, 47 F. 2d 112 (1931), cert. den. 283 U. S. 854; *Massachusetts & So. Constr. Co.* v. *Township of Gills Creek*, 48 Fed. 145 (1891), app. dismissed 154 U. S. 521.

of Appeals reversed and ordered the District Court to allow the disbarred attorney to recover his fee. In its opinion (342 Fed. 2d 421, 422), the Court carefully pointed out that "Among the grave responsibilities that must be shouldered by judges is that of the supervision of the administrative processes of judicature lest, though it would appear that justice is done, injustice result, and we do not disapprove of the interest shown by the judge below in making inquiry into the retainer arrangements Boucher had with his lawyers. Nevertheless, no overreaching and no fraud in those arrangements were discovered. . . ."

It is significant that in *Kuflik* as in the *Shiya* case, the Court found no need to cite any cases for these general propositions which were clearly sound and fully in accord with New York law as enunciated in *Gair* v. *Peck*, 6 N. Y. 2d 97 (1959), cert. den. 361 U. S. 374.

Although petitioner makes bald assertion that the courts below ignored New York law and the usual rule of "reasonableness", the courts below fully appreciated and followed the general rule of law in New York and other jurisdictions as is evidenced by the following:

(1) Judge Ryan permitted extensive cross-examination of Mr. Shiya on the claim made by the petitioner committee that Mr. Shiya was guilty of fraud, overreaching and breached legal ethics and that the retainer was consequently unconscionable before reaching the conclusion that

> "As to the contention that Mr. Shiya was disloyal to his clients, was guilty of any breach of profession or ethics, or guilty of unprofessional conduct, I also find there is no evidence to sustain that whatsoever. I think that everything he did here, as I look at it, was done with the idea of protecting to the very utmost the interests of his clients. He did so wisely, skillfully, and entirely ethically and professionally." (11a)

And in Finding of Fact 10 (15a), Judge Ryan found,

> "* * * Petitioner performed valuable legal services extending over twelve years which finally resulted in a judgment assigning said renewal copyrights to the Respondent."

(2) Although Judge Ryan, without urging by either party, advised the attorneys that jurisdiction being ancillary, he would be guided by federal law, he made it clear that such law was nevertheless exactly the same as the law of New York State. No objection was raised to Judge Ryan's comment. Indeed, petitioner's experienced trial lawyer agreed with the statement on the trial and never took issue with it until the issue was manufactured for the petition.

(3) Chief Judge Ryan had before him an extensive affidavit of services prepared by Mr. Shiya containing a recitation of the amount of legal work done in the Gibran litigation. This affidavit of services was used by the petitioner's trial counsel in cross-examination of Mr. Shiya and was before the court at all times (1b-46b).

(4) The courts below had before them many New York cases as well as federal cases and cases from other states, all of which referred to the same general law. These cases were cited by both parties without any intimation any choice of law question existed.

(5) The Court of Appeals was careful to indicate in its opinion that even if there had been no contract between the respondent, Shiya, and the petitioner, the fee of 25% of the value of the petitioner's recovery in the Gibran litigation, if considered in *quantum meruit*, would have been reasonable and not extravagant.

(6) The Court of Appeals for the Second Circuit is fully familiar with the problems which may arise because of a

conflict between Federal and State law. In a case decided *en banc* only 9 months before the argument of the *Shiya* case, the Court of Appeals for the Second Circuit in *Spanos* v. *Skouras Theatres Corp.*, 364 Fed. 2d 161, cert. den. 385 U. S. 986 (1966), considered a diversity case in which a plaintiff lawyer sought recovery in *quantum meruit* for legal services. The District Court found for the plaintiff lawyer. On appeal, the Second Circuit Court originally reversed with a dissent by Judge Friendly. The reversal was based on the fact that the New York Penal Law forbids a recovery of a fee for services rendered by a lawyer who is unauthorized to practice law in New York. Thus, the Court of Appeals in *Spanos* originally held that New York law controlled. On reconsideration *en banc* the District Court judgment was affirmed, in an opinion by Judge Friendly, which held that no state may prohibit a citizen with a Federal claim or defense from engaging an out of state lawyer to collaborate with a New York lawyer. Consequently, it was found necessary under the *Spanos* circumstances that New York law yield. It is difficult to understand how anyone can claim that the Court of Appeals for the Second Circuit was insensitive to state interests at the time of the *Shiya* appeal in view of its then recent holding in the *Spanos* case.

B.

The same general law applied in New York is similarly applied in other jurisdictions.

Petitioner cavalierly states that some jurisdictions are not in accord with the familiar rule requiring judicial interpretation of unconscionable, unreasonable and unfair attorneys' fees. Petitioner cites (note 17, p. 20) and discusses (p. 23) the cases of *Gray* v. *Joseph J. Brunetti Construction Co.*, 266 Fed. 2d 809 (3 Cir. 1959), cert. den. 361 U. S. 826 and *Bengoechea Macias* v. *De La Torre and Ramirez*, 84 Fed. 2d 894 (1st Cir. 1936). Both these cases follow the same general rule.

Gray was a diversity case to enforce a contingent fee contract for legal services which has been rendered before the Federal Housing Administration. In the *Gray* case, the Court found the retainer unambiguous. That the contract was fairly made. That since the plaintiff lawyer was not a member of the New Jersey bar the district court could not reduce the fee as might be allowed, under some circumstances by New Jersey law. The Court of Appeals for the third circuit observed that under New Jersey law that "attorney-client contracts for contingent fees * * * should not be carved away by the court except in an entirely clear case. * * * and in the absence of unfairness or fraud where there had been performed by the attorney the contract * * * ought not to be disturbed by the court but the parties should be left where they have placed themselves" (266 Fed. 2d 809 at p. 818). For this familiar proposition of law, the court in the *Gray* case cited New Jersey cases. It could just as well have cited New York cases for as pointed out above New York and New Jersey law are the same on this point.

The refusal of the court in the *Gray* case to "carve away" a contingent fee contract except in a "clear case" is merely another way for a court to state the verbal formula which had been held equivalent to unfairness or fraud, overreaching and consequent unreasonableness in *Gair* v. *Peck, supra.*

Petitioner cites the *Bengoechea Macias* (*supra*) case along with Gray for the proposition that some courts refuse to inquire into the reasonableness of an attorney's fee. In *Bengoechea Macias,* the attorneys sued to recover for legal services based on an account stated and on *quantum meruit.* The district judge found that the client had agreed to the account. The client asked the Court of Appeals to hold that the lower courts were in error on questions of fact. But the appeal to the Court of Appeals for the First Circuit brought up only questions of law.

The language quoted by the petitioner at page 33 of the petition is actually a quotation by the Court of Appeals from the opinion of the Supreme Court of Puerto Rico. The full quote from the Court of Appeals' opinion is as follows:

> "We do not undertake to express an opinion as to the reasonableness of the charges. This issue was correctly and adequately dealt with in the opinion of the Supreme Court which points out that: 'The first cause of action was upon the theory of an account stated and agreed upon, and if the plaintiffs-appellees were right, no question of the reasonableness of the services could arise in the Court below or in this appeal. The sole question would then be as to whether or not there was such an agreement or perhaps whether there could be such an agreement and other matters relating to the inclusion and exclusion of evidence. The second cause of action was abandoned and hence all questions as to the reasonableness of the services disappeared from the case' (84 Fed. 2d 894, 896)."

Certainly *Bengoechea Macias* cannot be cited for the proposition that the law of Puerto Rico prohibits a court of that Commonwealth from inquiring into the question of whether fraud or overreaching might require a court to refuse to enforce a retainer contract. In *Bengoechia Macias*, it was found as a fact that the client had agreed to the fee account. Under such circumstances, of course, no question of reasonableness would arise in any jurisdiction.

It seems clear that not only was no question of federal-state law application raised below in the *Shiya* case but it could not have been since there is no actual conflict amongst the state courts, nor between state and federal courts on the subject of interpretation of contingent retainers.

All jurisdictions examine lawyers' contingent fee contracts against various verbal formula, each of which, however, are the subtantial equivalent of each other. The Circuits are not in conflict. The Second Circuit generally has not and did not in the *Shiya* case depart from the uniform law on this matter.

POINT III

There is no conflict between the law of New York and "Federal law" with regard to the interpretation and construction of retainers said to be ambiguous.

As with the petitioner's claim that the law of New York differs from general law applied by the courts below in construing the Shiya contingent retainer with regard to the duty of a court to examine a retainer to determine if unconscionable or unreasonable, so the petitioner's assertion that the law applied by the courts below is contrary to the law of New York with regard to the construction of an ambiguous retainer contract is also invalid. Actually, the general law applied by the courts below and the law of New York are the same on the latter point as well as on the former.

As a primary rule of contract construction, the term "ambiguity" must first be defined. Ambiguity may mean there was no meeting of the minds at all (Restatement of Contracts Sec. 32) which requires a denial of specific performance. However, where there has been a meeting of the minds is conceded as in the *Shiya* case, but the words used in the retainer are said to have more than one meaning, the courts may inquire into the circumstances both prior to and contemporaneous with the making of the contract (Restatement of Contracts, Sec. 230). It is only after the application of the primary standards of interpretation, providing the meaning to be given an agreement still remains uncertain, then so-called secondary rules of

construction apply. The rule that the contract is to be construed against the party who made it is a secondary rule. Such interpretative rules apply with respect to all contracts including attorneys' contingent fee retainers. For instance, in the leading New York case of *Seligson, Morris* v. *Fairbanks Whitney Corp.*, 22 App. Div. 2d 625 (1965), the plaintiff law firm recovered a jury verdict of $228,000 for legal services under a retainer which it prepared. A question arose whether the retainer related to property owned by the defendant's subsidiary Pratt and Whitney. The defendants contended that if the contingent percentage related to the property of such subsidiary, it would give to the plaintiff lawyers an extraordinary and disproportionate award. As in the *Shiya* case, there was little dispute in the *Seligson, Morris* case over the nature of the services rendered or the great value of the benefits derived by the client. The trial court refused to charge in *Seligson* that any ambiguity in the retainer should be construed against the plaintiff lawyer who drafted the contract and left to the jury the issue whether the retainer covered the Pratt & Whitney property. The Appellate Division in affirming explained the meaning of the secondary rule of interpretation that ambiguous contracts should be construed strongly against the drafter in the following language (22 A. D. 2d 625, 632):

> "The jury knew, as the trial court commented, that all the persons who participated in the making of the written agreement were sophisticated persons with extensive business, and some with legal, training. Moreover, the written agreement was one drafted especially for the occasion; it consisted of nothing more than two typewritten letter-size pages; it had none of the qualities associated with contracts of adhesion such as a printed form lease, insurance policy, or bill of lading, where the parties are not of equal bargaining power, where much of the language used consists of

special words of art whose meaning is known only to specialists in the field, and where the length and format of the documents is such that the unsophisticated are likely to be trapped into undertaking or subjecting themselves to obligations never intended. The operative language has been described and quoted and is quite ordinary. Under the circumstances the refusal to charge on the particular standard with respect to ambiguity was without prejudice and it is unlikely that if the request had been granted the result would have been changed."

and again at page 633:

"The bald ambiguity instruction to the jury would have given the jury no significant or meaningful standard."

The holding in *Seligson, Morris* is peculiarly applicable in the *Shiya* case. As pointed out in the opinion of the Court of Appeals, *Shiya* v. *National Committee of Gibran*, 381 F. 2d 602, 1967, "The negotiations which preceded the November 1, 1956 retainer occurred over more than four years and are evidenced by many documents and some oral testimony, none of which is challenged".

In spite of the biased statement of facts in the petition, statements almost identical to those made in petitioner's briefs below, the true facts may be found in the informal opinions of Judge Ryan (10a; 112b), the findings of fact (132a) and in the opinion of the Court of Appeals.

As in *Seligson, Morris*, the *1953* retainer was carefully negotiated between Joseph Rahme, a Lebanese lawyer (17b) as President of the Committee through his attorney-in-fact, Dr. Basile, a well known and well respected New York medical doctor of Lebanese origin (15b-131b) and Mr. Shiya. The Lebanese Consul in New York a Mr.

Shebea also participated in these negotiations. Mr. Shiya had been legal consultant to the Consulate (51b).

In another case decided by an appellate court in the State of New York, *Matter of Schanger*, 7 A. D. 2d 275, affirmed 8 N. Y. 2d 972, without opinion (1960), the Court was required to determine the reasonableness of a legal fee contract which provided for return of 15% of the gross estate. This contract had been made after the attorney client relationship was created. The court recognized the general statement in the absence of any proof of fraud, the courts may not interfere with the contract of an adult competent client (7 A. D. 2d 277). However, since petitioner was illiterate and proved overreaching by the lawyer, then the retainer may be considered unconscionable and the burden of proving the retainer fair and reasonable and that it was fully understood by the client is on the attorney. In the *Schanger* case, the Appellate Division fixed a fee on *quantum meruit*.

The petitioner's attempt to prove fraud or overreaching on the trial failed. The respondent, on the other hand, proved extensive negotiations by mature, knowledgeable parties before any retainer was signed. The attorney-in-fact for the respondent committee, Dr. Basile, as pointed out in the Court of Appeals opinion, prior to retaining Shiya, "consulted 10 to 12 law firms including Shiya's * * * Thereafter while in Lebanon during July and August, 1953, Basile discussed hiring of a lawyer with Rahme who told Dr. Basile that Shiya's proposal was too high and instructed Basile to interview additional New York lawyers. Upon his return to the United States, Basile contacted 7 or 8 more law firms. Unable to locate a competent lawyer who would better Shiya's terms, Basile on December 3rd, 1953 retained Shiya * * *".

The original retainer provided for "35% of all sums recovered" and required that Shiya pay all expenses. The

committee would not have hired Shiya under any other circumstances. Three years later, when the committee realized that the renewal royalties from Gibran's works might amount to more than had ever been expected at the time the original retainer was signed and due to the pressure put upon Shiya by his client of long standing, the Lebanese Consul General, Mr. Shiya "with great reluctance, finally assented to Shebea's (Lebanese Consul General) suggestion of a fee equal to 25% of the total recovery." The negotiations were conducted in Arabic, which was fully understood by both Basile and by Rahme. Because of the extensive negotiations both prior to and contemporaneous with the retainer agreements of both 1953 and 1956, which excluded any possibility of overreaching, it became very obvious that the secondary rule of construction concerning interpretation of attorneys' contracts against the maker has little application to a decision as to the meaning of such retainer.

The law of New York was repeated in *Unterberg* v. *Therm-air Mfg. Co. Inc.*, 14 N. Y. 2d 859 (1964), reversing 20 A. D. 2d 260 (First Department). In the *Unterberg* case, the Appellate Division by a three to two opinion found for the client but the New York Court of Appeals reversed for the reasons stated in the dissenting opinion. The dissenting opinion in the Appellate Division at 20 App. Div. 2d 260, 263, held that if a contemporaneous underwriting agreement were to affect the obligation of the defendant to a plaintiff lawyer, then the agreement should have expressly so stated and found, "There is no reason why they (plaintiff lawyers) are not entitled to their fee."

In the face of these cases, it is incongruous for the petitioner to imply that under New York law if a retainer is ambiguous then regardless of the circumstances the retainer must always be interpreted in favor of the client.

In *McAvoy* v. *Schramme,* 238 App. Div. 225 (1933), affirmed 263 N. Y. 648 (1933, no opinion), the Appellate

Division affirmed a case in which the trial court had refused to charge a jury that if a contract of retainer is capable of more than one construction, it is to be construed "most favorable, most strongly, in favor of the client". The New York Appellate Division in the *McAvoy* case examined the retainer in exactly the same way as did the Court of Appeals in the *Shiya* case and decided that the question of the meaning of the words in the retainer (238 App. Div. 228), "depends upon an interpretation of the contract of retainer, particularly with respect to the intention of the parties as disclosed by its terms in the light of the surrounding facts and circumstances". And as did the Court of Appeals in the *Shiya* case, so in the *McAvoy* case, the Appellate Division held that since the trial Judge and the Appellate Division had before them the evidence of the work done by the plaintiff lawyer, that they would hold that the plaintiff lawyer was entitled to a jury finding in his favor.

All of these New York cases agree with the general rule that a court, in determining what the parties to a contingent retainer meant, should first examine all circumstances surrounding the making of such retainer to resolve, if possible, any ambiguity in the retainer. The secondary rule re: strict construction against the maker is only used when it is not possible to resolve the ambiguity.

A study of the opinion of the Court of Appeals shows that the court followed the accepted rules of construction. It first examined the negotiations preliminary to the 1956 retainer and pointed out that such negotiations included the 1953 retainer and many letters and documents "none of which is challenged" (App. 3).

The Court of Appeals referred to the original (1953) retainer as providing for "* * * 35% of all sums recovered * * *". The opinion then examined the negotiations between the 1953 and 1956 retainers to the point where Mr. Shiya "with great reluctance finally assented" to the

suggestion of the Lebanese Consul General of "a fee equal to twenty-five per cent of the total recovery".

The Court of Appeals then observed that the petitioner Committee refused to sign the September 1956 letter because it gave Shiya "25% of the moneys that are due or that shall become due" (App. 10).

Because of the many "surrounding circumtsances" the opinion found the 1956 retainer was not "totally lacking in ambiguity". Nevertheless, a full examination of these "surrounding circumstances", in the nature of the oral testimony, at trial, by Shiya and Basile, as well as the documents and letters involved led the Court of Appeals to decide that the "meaning and intent" of the parties "at the time of the November 1, 1956 retainer" was that Mr. Shiya receive 25% of all renewal royalties (App. 14). This being the true understanding of the parties, the secondary rule of strict construction against the maker of a contract became inapplicable for the "ambiguity" had been resolved.

The New York cases cited by the petitioner do not hold contrary to the general law concerning the construction of ambiguous retainers. In *Mackey* v. *Passaic Stone Co. Inc.*, 36 N.Y.S. 2d 232, Queens County, Supreme Court, 1942, and cited by petitioner, page 21, note 19, the Court held that where an attorney, who was hired on a 35% contingent retainer after becoming aware that the person he was hired to sue had a valid counterclaim and thereafter did not change the terms of the retainer, was entitled to only 35% of the difference between the amount he recovered by suit and the successful counterclaim. In a 3 to 2 affirmance, 266 App. Div. 690, the Court pointed out that contrary to the statement contained in the opinion of the trial judge, the record showed that the plaintiff lawyer had full knowledge that his clients had failed to pay for materials when he prepared the retainer, and, therefore, must have understood that when he used the words

"moneys recovered" as the basis of the computation of his fee, he assumed the risk that his recovery would be diminished by a counterclaim. This was affirmed 292 N. Y. 525 (1944). Thus in *Mackey* there was no holding that once a retainer is found ambiguous the client must always win. On the other hand, the *Mackey* case required a full examination of the circumstances surrounding the making of the contract. The holdings in the New York cases of course, do not differ from the general rules set out in the 7 C.J.S. Sec. 186 (p. 1062).

The petition does not question that determination of reasonableness or conscionability of any contract must be tested by the situation existing at the time the contract was made and not at a future time affected by the happening of events which were unforeseeable at the time the contract was made.

In the *Shiya* case, when the petitioner agreed to a fee of 35% of all sums recovered on the renewal copyrights in 1953 the chances that the renewal copyright would be of great future value were remote and could not have been in the minds of either Mr. Shiya, Dr. Basile or Mr. Rahme. The petitioner seems not to question that when the 1953 retainer was made it called for a "reasonable" fee regardless of whatever connotation be given to the word "reasonable". When the petitioner realized that the wholly unforeseen sale of Gibran's books between 1953 and 1956 would result in an increase of the value of the total renewal royalties, it successfully induced Shiya to accept 25% of the "total recovery". Even in 1956, however, the parties did not foresee that future sale of Gibran's works would make the renewal royalties of great value.

As Judge Ryan pointed out to the attorney for the petitioner on the trial, when that attorney pleaded that the fee might reach "six or seven or eight hundred thousand",

> "The Court: The trouble, counselor, is that when this suit started nobody had any idea, not even the

remotest idea, that the royalties would amount to such a large sum as they did.

Mr. Sams: That is absolutely true, your Honor." (117b)

Again at the very opening of the trial, the petitioner's attorney made a statement which showed that he fully appreciated this point. Mr. Sams in his opening remarks to Judge Ryan said (14b),

> "it very well may have been that, now that we know the true value of these copyrights, perhaps $135,000, $120,000 may have been a reasonable fee. We don't know that, we have to consider what the parties considered at the time they made their contracts, because the contracts are what will govern."

The other New York cases cited by petitioner (p. 21, note 19) agree with the same general law.

In *Hawke* v. *Dorf*, 148 App. Div. 326 (1911), the Court refused to follow the construction urged by the plaintiff attorney since to do so would result in a fee in spite of the fact that his efforts were fruitless. The court decided, after examining the retainer and the surrounding circumstances that the "reasonable construction" was in the client's favor.

In *Samuels* v. *Simpson*, 144 App. Div. 466 (1911), the Court refused to follow the reasoning of the plaintiff attorney as to the construction of the language which was hopelessly doubtful since the construction urged by the lawyer would result in his "* * * gain by defeating the bequest to his client".

In *In re Smith's Will*, 11 Misc. 2d 170 (1958), the Court construed a retainer against a plaintiff lawyer, who failed to testify and who was the draftsman of his own mother's Will and in that Will disregarded a desire of his mother to always provide a home for his brother and sisters.

In the case of *In re Vaupel's Estate,* 37 N.Y.S. 2d 853, affirmed 266 App. Div. 723 (1942), the court construed an oral retainer against an attorney when it was unfair on its face and because of the fact that the client had no experience in business nor in litigation, and found that the transaction ". . . does not meet the standard of conduct required by a member of the bar" (37 N.Y.S. 2d 856).

In *Race* v. *Harris,* 246 App. Div. 367 (1936), the retainer was drawn by an attorney of "wide experience" "* * * dealing with a colored minister's elderly widow, who was inexperienced in legal affairs" but since the retainer did not "shock the conscience of the court" was not completely set aside.

The opinions in the *Unterberg* and *McAvoy* cases indicate that the New York courts follow the traditional primary standards of interpretation in deciding an issue involving an "ambiguous" retainer. The so-called rule of strict construction against the maker is but a secondary rule (Restatement of Contracts 336). This rule of strict construction is invoked in the New York courts as it is in all other jurisdictions where the parties do not deal at arm's length or as a make-weight to reject an unreasonable construction of the retainer urged by the attorney plaintiff.

The federal cases cited at page 29 of the petition fully support the proposition that federal and state law on this question is similar.

In *Vans Agnew* v. *Fort Myers Drainage Dist.,* 69 F. (2d) 244 (5 Cir. 1934), the court adopted a construction in accord with the "well settled" Florida law and added, 246, "Resort to the rule construing a contract against the party who chose the language of it hardly is needed to justify the conclusion" (of the court).

The case of *Ridge* v. *Healy,* 251 Fed. 798 (8 Cir. 1918), involved a retainer entered into by a lawyer with a widow after the attorney-client relationship had been established

and after "extended social intercourse". The court set the contract aside, characterizing it is as "unfair", "unequitable" and "unconscionable" but only after a long opinion carefully exploring all surrounding circumstances.

Even Judge Hays in his dissent in the Court of Appeals never indicated that it was his opinion that the fee was unreasonable or unconscionable, nor did Judge Hays accuse the majority of refusing to inquire into the "reasonableness" of the contract.

It is quite clear, that the law of the State of New York is no different than the law generally applied to attorneys' retainers with regard to interpretation of ambiguous terms. Because the contract is ambiguous, does not mean that the attorney must lose in his attempt to enforce the contract. The surrounding circumstances must first be examined, as was done in the opinion of the Court of Appeals in this case, to decide whether under primary rules of construction the ambiguity can be resolved. If the reasonable interpretation favors the lawyer then the ambiguity has been resolved and no secondary rules of construction come into play.

POINT IV

Contrary to the rules of this Court, the petitioner merely seeks a review of the opinion of the Court of Appeals on its interpretation of the testimony, letters and documents which make up the surrounding circumstances of the 1956 retainer.

The negotiations leading to the retainer and the retainer itself have been intensively studied by the courts below. There is no reason for re-examination by this Court.

A.

The trial and results in the District Court.

Chief Judge Ryan had before him a long affidavit of services prepared by Shiya in support of his original peti-

tion under New York State Judiciary Law 475 (1b, 46b). This affidavit was considered by the District Judge in reaching his decision which involved deciding facts and law. There was no objection made to such procedure by the trial counsel for the petitioner.

The first act, preliminary to the trial below, was a stipulation made by petitioner's trial counsel that Mr. Shiya's fees need not be determined upon *quantum meruit* (2b) but were to be determined solely upon the construction of the November 1, 1956 retainer (p. 9, Pet. brief Dist. Ct.). No issue was raised by petitioner in any court that the 1956 retainer was "unreasonable" when made. Indeed the petitioner makes no claim in this Court that either the 1953 or 1956 retainer was unreasonable at the time each was made.

The outline of the evidence presented at the trial is contained in pages 3 through 21 of the respondent's brief in the Court of Appeals and need not be repeated at length here. Obviously respondent disagrees with the slanted outline of the evidence in the petition but does not believe a re-argument of these factual questions is germane. The decision of the Court of Appeals was the final determination on these issues of fact.

Mr. Shiya's legal work in the Gibran litigation was described by Judge Ryan (123b) as follows:

> "I think a splendid job here was done by this attorney, a splendid job. He took a case that apparently nobody wanted to handle. Apparently, the Town itself did not want to advance any money for it, and they were in receipt of moneys * * * They did not even want to spend any of that so they did not have much faith in their ultimate success."

Although the comments, findings of fact and informal opinion of Judge Ryan and the opinion of the Court of

Appeals made reference to the facts as found by impartial *fori*, the petitioner continues, as he did in the District Court and in the Court of Appeals, to ignore the court's findings and attempts to create a prejudice in this Court by an inaccurate biased recitation of facts. For instance, the petitioner continues to assert that its own attorney-in-fact, Dr. Basile, did not inform the Rahme Committee of the events concerning the royalties during the 1960-1964 period and implies that this is some evidence of overreaching. But the petitioner does not advise this Court that several "committees" claimed a right to the Gibran royalties during the 1961-1964 period. At one time, three individuals claimed the right to the Gibran royalties as "President" of the true Committee. Indeed, individuals in Becharre urged Dr. Basile, the committee's attorney-in-fact not to send any money to the committees in view of the "gun play" that was going on in Becharre amongst the persons who were fighting for the Gibran royalties (48b-49b).

The petitioner further ignores the fact that Mr. Shiya (63b) and Dr. Basile (103b) both testified that the retainer by which Dr. Basile hired Mr. Shiya was to relate to "the full term of the renewal copyrights and 25 or 30 per cent of the whole amount."

It is also of some importance to note that even while the case was on trial in the District Court of New York, the question who was President of the "committee" was still the subject of doubt in Lebanon for Judge Ryan received a cable from a "lawyer Meskawy" which originated in Lebanon asserting that the Rahme committee was illegal. Indeed, the evidence of the continued battling amongst the various persons alleged at various times to be the president of the committee, induced Judge Ryan to order that the funds being held by the Southern District Court be paid directly to the Town of Becharre in care of the Lebanese Ambassador (113b).

After hearing the evidence of the duplicity of the various Gibran Committees and the handling of the royalties, Judge Ryan said (113b):

> "The Court: Well, I think that it is a tragedy that this controversy has arisen as to how this money should be spent which Gibran intended should be used for charitable purposes in connection with his native village. It might (sic) presumptuous on my part to even suggest it, but it seems to me that this is a matter in which the government perhaps might well step in and see that the fund is administered to accomplish the purpose that the testator intended.
>
> My own reaction is that when we determine what the fee is to be which is to be allowed to the petitioner herein, that any other funds which are in control of the Court be paid directly to the Town of Becharry in care of the Ambassador of Lebanon, who has been recognized as the representative of that country here in the United States of America, and let him determine who should get it rather than trifling around with these committees."

Indeed, the only reason the Government of Lebanon has any present interest in this petition is because of this action by Judge Ryan (November 22, 1966).

Although in the petition, the petitioner accuses the courts below of having paid little attention to "the September agreement and focused instead on the November, 1956 letter" (Petition, p. 31) in its brief in the District Court, the petitioner stated that the agreement of November 1st, 1956 has always been considered by the committee as the sole binding contract (pp. 16, 17, petitioner's brief, District Court). The attitude of the petitioner in the District Court was that neither the 1953 nor the 1956 retainer was ambiguous (See 36, petitioner's brief, District Court), and that the 1956 retainer was a valid binding contract freely

entered into by both parties (p. 41, committee's brief in District Court).

However, in the Court of Appeals, the petitioner (p. 21, petitioner's brief, Court of Appeals) completely changed its theory. The first five questions which the petitioner requested the Court of Appeals to inquire into had to do with the failure of the District Court to consider "the complete exchange of letters," alleged errors in interpretation, and construction of the November 1st, 1956 letter; the failure to "consider all circumstances of the preliminary negotiations" and a failure "to consider all circumstances of the subsequent conduct of the parties."

The opinion of the Court of Appeals indicates that that Court did everything which the petitioner's brief asked it to do. It first examined the negotiations prior to the November, 1956 retainer; found that contrary to Judge Ryan's holding the November, 1956 retainer was not entirely free of ambiguity and as the petitioner requested, examined the "surrounding circumstances" and then held that Judge Ryan's interpretation of the essential meaning of the November, 1956 contract was correct.

It is quite apparent that the petitioner will change its position from court to court to suit immediate needs. In the District Court, it asserted that the only contract which was binding on the parties was the November, 1956 retainer, and that this was unambiguous. When Judge Ryan held against them on this very point, it changed its approach in the Court of Appeals and took the opposite position that the November, 1956 contract was ambiguous and that surrounding circumstances should be examined. When the Court of Appeals performed as the petitioner wished and did examine the surrounding circumstances and nevertheless found in favor of Mr. Shiya, it now would convince this Court that the problems involved in the lower courts were not merely the usual interpretation of the facts and law controlling a retainer but a new issue specially cre-

ated and tailored for this Court, viz.: a theory that the District Court refused to follow state law as demanded by petitioner and used an inapplicable and incorrect federal law. This newest attitude is obviously created solely to manufacture an issue in the hope that this Court can be convinced an issue of national importance exists.

The petitioner's unembarrassed alteration of position from court to court is evidenced also by its reference to the ease of the defense of the committee's position by Mr. Shiya during the 14 years that the Gibran litigation was before the courts. At page 6, note 4, of the petition, it states that to demonstrate the unreasonableness of the 1956 retainer it should have been given the right to show to the District Court the simplicity of Mr. Shiya's defense of the petitioner in the *Gibran* case. The record is bare of any attempt by the experienced trial lawyer for the committee to make any such request during trial. To decide the case of *Gibran* v. *The National Committee of Gibran*, 153 Fed. Sup. 854 (1957), required a 5-page opinion by Judge Weinfeld, in which it was necessary to distinguish the *Gibran* case from the case of *Silverman* v. *Sunrise Pictures Corp.*, 273 F. 909 (2 Cir. 1921). In the *Gibran* case, the administrators c.t.a. relied heavily on the *Silverman* case as a holding contrary to the position of the National Committee in the *Gibran* case. The administrators c.t.a. thought enough of their position in reliance on the *Silverman* case to appeal to the Court of Appeals, which in an opinion of Judge Learned Hand affirmed at 255 F. 2d 121 (1958), and indeed, sought certiorari in this Court on the basis of an alleged conflict between the *Gibran* case and the *Silverman* case, cert. den. 358 U. S. 828 (1958).

As pointed out in the brief of the respondent Shiya in the Court of Appeals, the so-called September, 1956 letter was never signed by Mr. Rahme nor by anyone and the fact that the petitioner did not believe its importance sufficient enough to put it in evidence at the trial until after

Judge Ryan had indicated what his holding was going to be was brought to the attention of the Court of Appeals. The amoebic approach by the petitioner did bear some fruit, however, for it seemingly convinced Judge Hays that Mr. Shiya had failed to assert any claim to the renewed royalties paid to the committee after termination of the Surrogate's Court proceedings. As a matter of fact, Mr. Shiya never knew these payments were being made and presumed that the publisher would not make any payments to the committee because of the pending tax problem and doubt as to the identity of the true committee president, since the Lebanese courts had held that a man named Tok not Rahme was the then true president of the committee. Mr. Shiya so testifed and this was brought out in the briefs on appeal (90b-92b).

Indeed, Judge Hays also in his dissenting opinion mistakenly referred to the postscript on the letter of September 8th, 1956 from Dr. Basile to Rahme as being made by Basile, whereas both parties understood and agreed that this was written by someone in Lebanon as a note on Dr. Basile's letter. No one ever claimed that this was a postscript made by Dr. Basile. The scatter shot methods used by the petitioner did succeed in effecting a partially successful smoke screen with Judge Hays.

The reference by the petitioner to the alleged ineptness of Mr. Shiya with regard to the "tax question" is another of the continued attempts begun in the District Court to blacken Mr. Shiya's name. The testimony on this point was very clear. Mr. Shiya testified without contradiction (85b) that this tax problem was created not by him but by the attorneys for the administrators c.t.a. who feared that their clients would be taxed if the funds remained in their clients' hands for more than a year (98b). Indeed, Mr. Shiya attempted to convince District Judge Weinfeld not to send the funds back through the Surrogate's Court (94b) and appealed from Judge Weinfeld's refusal to do so (95b).

The petitioner had a full opportunity to prove the factual allegations made in the petition on the trial but was unable to produce any evidence to support such claims. The findings of fact and the conclusions of law in the courts below are a complete answer to the petitioner's unsupported assertions.

Conclusion

The writ of certiorari should be denied. There was no question of competing federal-state interests in the courts below. The questions have been manufactured for this Court's interest in an attempt to comply with this Court's rules.

There is no real difference between the general law on the subject of construction of contingent retainers applied in federal and state courts or between the law applied in the courts of various states.

The petitioner makes no claim that the Shiya retainer was unconscionable or unreasonable when made. At that time a 25% interest in the Gibran renewal royalties was never expected to reach its present value. The test of reasonableness of such contracts is made at the time the retainer is made and is not affected by unforeseen, unpredictable future events.

Respectfully submitted,

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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

No. 776

THE NATIONAL COMMITTEE OF GIBRAN, also known as THE COMITE NATIONAL DE GIBRAN, representing the Town of Becharre, Lebanon,

Petitioner,

v.

GEORGE G. SHIYA,

Respondent.

MEMORANDUM IN OPPOSITION TO THE MOTION OF THE REPUBLIC OF LEBANON FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

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MEMORANDUM IN OPPOSITION TO THE MOTION OF THE REPUBLIC OF LEBANON FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The respondent, George G. Shiya, answering and opposing the motion of the Republic of Lebanon seeking leave to file a brief *amicus curiae* and also seeking permission to file a brief in support of the petition.

The asserted interest on the part of the Republic of Lebanon does not warrant granting permission to file a brief in support of the petition. That interest is solely limited to a repetition of the claim made in the petition that, although the Shiya retainer was reasonable and conscionable when made, because of the unforeseen increase in the value of the renewal copyrights, Mr. Shiya should not have the right to enjoy the fruits of the retainer.

POINT I

The public interest of Lebanon did not exist at the time the retainer was made. If a public interest had existed, the construction of the retainer by determining the intent of the parties, as was done by the courts below, precludes applicability of any secondary rule of contract construction.

The assertion that the retainer should be construed in favor of the petitioner although both courts below have found that the intent of the parties to the retainer accords with Mr. Shiya's claim, perhaps is best refuted by a reference to the quotation made by the Republic of Lebanon on page 10 of its brief. At that page, it quotes from Corbin on Contracts (1960 ed.) chapter 24, Section 550, pp. 194-196. Seemingly, the writer of the Lebanon brief realized that the contract made between Mr. Shiya and the petitioner did not actually involve the Government of Lebanon when it was made for without advising the Court of the omission, the writer of the brief excluded from the middle of the quoted paragraph the following important sentence:

> "* * * In order to regard it as truly a rule of interpretation, when applied to a transaction in which government is not itself a party, we must make an assumption that persons who are contracting as to their private interests also have in mind the public interest."

As proof that the interest of the Government of Lebanon was not involved when the retainer was made, and that the petitioner had its own interest in mind, we submit the following:

1. The conclusion of Judge Ryan (113b). After hearing the testimony concerning the personal attempts by Rahme, the lawyer and others in Becharre to control the Gibran funds, was caused to state,

> "(1576) The Court: Well, I think that it is a tragedy that this controversy has arisen as to how this

money should be spent which Gibran intended should be used for charitable purposes in connection with his native village. It might (sic) presumptuous on my part to even suggest it, but it seems to me that this is a matter in which the government perhaps might well step in and see that the fund is administered to accomplish the purpose that the testator intended.

My own reaction is that when we determine what the fee is to be which is to be allowed to the petitioner herein, that any other funds which are in control of the Court be paid directly to the Town of Becharry in care of the Ambassador of Lebanon, who has been recognized as the representative of that country here in the United States of America, and let him determine who should get it rather than trifling around with these committees."

2. It was only in September, 1967, after Judge Ryan decided that the varied committees of Gibran should not be trusted with the Gibran funds and insisted that the moneys held by the Southern District Court go to the Lebanese Ambassador to the United States, that the Government of Lebanon took any steps to control the use of the Gibran royalties.

The obvious intent on the part of the government in Lebanon is to arouse sympathy in this Court for the petitioner's position.

It is respectfully submitted that if the assertions in Lebanon's brief were germane to the litigation, they should have been presented as evidence at the time of the trial before Judge Ryan or brought to the attention of the Court of Appeals. The place for testing of bald assertions is at the trial stage when the parties have an opportunity to test possible relevance and competence.

3. Although the Lebanese Consul General in New York consulted Mr. Shiya prior to the signing of the 1953 re-

tainer and although the same New York Consul General, Mr. Shebea, himself a lawyer of note in Lebanon, acted with Dr. Basile, the attorney-in-fact for the Committee in "convincing" Mr. Shiya to reduce his percentage of the total renewal royalties from 35 to 25% (52b-69b) the Government of Lebanon did not think its interest of sufficient import at the time of the trial of this case to produce Mr. Shebea, who at the time of trial was still in the employ of the Government of Lebanon, to testify concerning the conversations among Mr. Shiya and Dr. Basile and himself prior to the signing of the 1956 retainer. Both Mr. Shiya and Dr. Basile testified that all parties at that time understood Mr. Shiya was to have 25% of the total recovery. It is obvious that Consul General Shebea was not brought to the trial because the Republic of Lebanon had no interest in what committees of Gibran or what persons controlled and used the Gibran funds for the many years preceding Judge Ryan's order.

POINT II

The rule of construction concerning public interest presented by the Republic of Lebanon is similar to the position of the petitioner concerning interpretation of contracts against the maker. In presenting that view, the petitioner does not need the aid of the Republic of Lebanon.

Both the rule claimed as relevant by the Republic of Lebanon and that espoused by the petitioner are similar. Both are secondary rules of contract interpretation. Both must await application until the contract has been construed to determine, if possible, the actual intent of the parties. In this case, the only persons who negotiated the contract testified that it had the same meaning. Dr. Basile, the attorney-in-fact for the committee, testified that the 1953 retainer resulted after "The response of the Commit-

tee after full discussion and decision was to the effect that it was their preference that I retain Mr. Shiya on a contingent basis of 35 per cent of all sums which Mr. Shiya's efforts might eventually bring to the Town of Becharry, less disbursements." (43b) and also testified (36b) that at no time during his conversations with Mr. Shebea, the Lebanese Consul General (re: the 1956 amendment), was there any discussion about limiting the moneys to the percentage held in Court at any time.

The other person to this contract, Mr. Shiya testified (63b) in answer to a question put to him by Judge Ryan,

> "I was asked, if your Honor please, on what the percentage did I require (sic) would be based, and I stated that it would be based on the full value of the renewal copyrights for the next 28 years, inasmuch as I said as that was the subject of the litigation in the complaint and in the controversy between Mary Gibran and the Committee."

The above testimony of both Mr. Shiya and Dr. Basile was uncontradicted. Certainly, if parties to a contract agree on their intent, and any ambiguity is thus resolved, then secondary rules of interpretation as set forth by the petitioner and the Government of Lebanon never come into play.

Conclusion

It is respectfully submitted that the application of the Government of Lebanon to file a brief *amicus curiae* should be denied. The position of the petitioner is fully covered by the extensive brief in support of granting the writ and the interest and brief of the Government of Lebanon adds nothing significant to that position. Accordingly, because of the matters set forth in the brief in opposition to the

petition for the writ and the matters set forth in this memorandum, it is respectfully submitted that there is no reason for the granting of the writ of certiorari and it should be denied.

Respectfully submitted,

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 776

THE NATIONAL COMMITTEE OF GIBRAN,
also known as THE COMITE NATIONAL DE GIBRAN,
representing THE TOWN OF BECHARRE, LEBANON,
Petitioner,

v.

GEORGE G. SHIYA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Respondent's brief in opposition concentrates upon the choice of law question and not upon the other grounds advanced in the petition respecting the substantive principles that should control attorney-client fee litigation. Thus, for example, respondent does not even mention petitioner's contention (Pet. p. 32) that the decision in the case at bar is in conflict with *Maddox v. Fidelity Investment & Title Co.*, 300 F.2d 1, 3 (4th Cir. 1962). Accordingly, there is no occasion for us to reply to anything other than respondent's discussion of the choice of law problem.

Respondent does not deny that the issue of choice of law in federal court attorney-client fee litigation is important, nor

that the lower courts' election of federal law conflicts with the election by other federal courts of local law. Respondent maintains that, nonetheless, certiorari should not be granted because for two reasons this case is not an appropriate vehicle for considering the question presented; (1) the choice of law question was not raised by petitioner in the lower courts, and (2) resolution of the issue one way or the other would have no impact in this case because federal law is identical to local law on the only substantive issues here involved. In this reply, we show that the fact that the choice of law question was not raised in the lower courts should not preclude review and that there are important differences between the law of New York and the law applied by the lower courts in this case.

As we stated in the petition and as the statistical case citation index provided by respondent suggests (note p. 4), petitioner did rely upon New York law in the lower courts. It is also true, however, that neither party explicitly raised the question as to whether New York law or federal law should control. Rather, respondent attempted to distinguish the New York decisions cited by petitioner in much the same fashion as he does in this Court, and both parties cited a scattering of cases from other jurisdictions as being in conformity with their respective interpretations of New York law.

But the question is not really whether, or why, neither party dealt with the choice of laws question in the lower courts, but what relevance that fact has to the petition for certiorari – a problem respondent does not touch except by the mistaken reliance upon cases like *Ellis v. Dixon*, 349 U.S. 458, which arose in state courts and which accordingly posed the adequate state ground question.

In some circumstances, of course, the fact that an issue was not presented to the court may result in waiver. But that result should not obtain in this case for two reasons. First, choice of laws, like jurisdiction, is an issue that is necessarily met by the trial and appellate courts in this type

of case. That is, in resolving the substantive issues presented, the lower courts could not possibly avoid determining the appropriate body of law against which the substantive contentions were to be measured. And, second, the District Court explicitly ruled that federal laws applied and, for the reasons advanced in our petition (pp. 17, 24-25), there is every reason to believe that this view was shared by the Court of Appeals.[1] And where a court passes upon an issue, the fact that it was not raised is, of course, wholly immaterial.

Thus, although the choice of law question was not raised by petitioner, the lower courts opted for federal law, and if that is so then there is an undeniable conflict with *Carter v. Spanos*, 250 F.2d 814, 816 (8th Cir. 1958), and *Gray v. Joseph J. Brunetti Construction Co.*, 266 F.2d 809 (3d Cir. 1959). Respondent does not even mention *Carter*, and its discussion of *Gray*—that the court "could just as well have cited New York cases [as New Jersey cases]" (p. 12) – wholly misses the point with respect to the choice of law question.

We add that, even without a conflict, the question of choice of law is quite difficult and important enough to deserve resolution by this Court. Viewed from this perspective rather than in the context of a conflict of decisions, the ambiguity of the Court of Appeals' decision is even less relevant. Moreover, as we have indicated (Pet. p. 25), this Court has granted certiorari in the absence of a conflict in circumstances very much like those presented here – where the "opinion of [the Court of Appeals] does not make clear whether affirmance was based upon agreement with the trial judge that New York law was applicable, or

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[1] In this connection, it may be noted that such a view would accord with the Court of Appeals' choice of federal, as against New York, law in the case cited by respondent, *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, cert. den., 385 U.S. 986. That decision also indicates that, as respondent himself suggests (p. 11), it is most unlikely that the Court of Appeals inadvertently overlooked the choice of law problem in the case at bar.

upon a determination that the controlling legal principles would in any event be no different under maritime law." *Kermarec v. Compagnie Generale*, 358 U.S. 625, 628.

One final word on this branch of respondent's argument seems appropriate. Respondent seems to suggest that, although the District Judge clearly held that federal law governed, that determination should not be taken seriously because the Judge was of the view that federal and state law were identical. And respondent charges us with an "obvious attempt" to "create an unfounded issue" by "truncating" the District Court's statement. We demonstrate below that New York law is decidedly different than the law of many other jurisdictions, so that it is unlikely that the Judge would have thought the contrary. But the point we make is that, whetever the Judge might have thought, respondent is surely in error in construing what he said. The passage in question,[2] as we observed in our petition (p. 17 n. 13), is plainly limited to an issue that was raised in the District Court but that is not relevant here, namely, whether the Court had jurisdiction in ancillary proceedings to consider respondent's claim, not only for fees arising out of the copyright litigation, but for fees unrelated to that litigation. As to this, it is quite true that the Court would have no jurisdiction under New York law or any other law of which we are aware. Accordingly, respondent's effort to draw some sort of concession from the "Thank you, Your Honor" of petitioner's counsel would fail even if that remark had been in response to the Judge's statement respecting its jurisdiction, as respondent says it was (Br. in Opp., p. 3). But in fact, the remark was in response to the Judge's "All right. Now we will hear from you Counselor Sams. Take your time" (R. 1582).

[2] "However, I think the Federal Law on this is substantially as set forth in the New York State Judiciary Law and that the jurisdiction of this Court is for the fixation of fees earned in the particular litigation filed in this Court and does not extend to other matters and does not extend to the enforcement of a general attorney's lien" (R. 1582, App. 116b).

2. Respondent's second principal contention is that choice of law in this case could make no difference because the federal law applied by the lower courts was identical to New York law, which in turn is identical to the law applied in all other jurisdictions. Respondent is demonstrably incorrect.

a. There are two aspects to the problem of the supervisory authority of a court over the amount of contingent fee contract: (1) whether the court will limit the fee to a standard of "reasonableness" in the absence of palpable fraud and over-reaching; (2) whether the court will test the fee by factors other than the proportion of the fee to the recovery. In both respects, the decisions of the lower courts depart from the law of New York, although at least as to the former they are in accord with the law of many other jurisdictions. While we have already discussed this aspect of the case (Pet. pp. 20-22, 32-33), respondent's counter arguments deserve response.

Respondent obviously recognizes that the lower courts did not accept petitioner's contention that, questions of fraud and overreaching apart, the amount of the fee was subject to the test of reasonableness under the rule of *Gair v. Peck*, 6 N.Y. 297, 160 N.E.2d 43 (1959). Respondent points out (pp. 8-9) that in another decision, *Matter of Kuflik*, 342 F.2d 421 (1965), the Court of Appeals applied the test of "overreaching and. . . fraud"; and respondent maintains (p. 7) that this conforms with *Gair*, for that case "was not meant to and did not have any effect on. . . New York law as expressed in *Matter of Mason*, 174 Misc. 218 . . . where the court said . . . 'Since both of the parties were competent adults, it was open to them to fix this remuneration in advance, and in the absence of inequitable dealings in the inception of the contract, a court . . . would presumably enforce it according to its terms. . . since, as a general principle, the courts will not concern themselves with the terms of a contract if fairly attained."

But while the lower courts, having resolved questions of respondent's breach of duty against petitioner and having stopped there, plainly applied the "competent adult" test, just as plainly that is not the test of *Gair*. There is room for debate, as the majority and minority opinions in *Gair* demonstrate, about the status of the prior New York decisional law. See Note 60, Colum. L. Rev. 242, 246. Indeed, as the minority opinion in *Gair* points out, the Association of the Bar of the City of New York evidently had despaired of persuading the courts to supervise contingent fee contracts except in cases of fraud and overreaching.[3] But there is no room for debate that *Gair* represented a notable liberalization of the fraud and overreaching standard, not simply a new formula for expressing the same standard. If words are to be accorded their ordinary meaning, surely a test of "reasonableness" means something different than a "fraud and overreaching" criterion or a "competent adult" test or the various similar standards applied in a number of other jurisdictions.[4] That the adoption by the New York court of this standard was a marked ad-

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[3] In 1938, a committee of the Association commented: "There is little practical scope left for the argument that the courts retain any power in this field apart from fraud and overreaching. . . .[T]he lines of judicial and legislative doctrine are too firm by this time to sustain the hope of successful modification by the judiciary alone. . . ." Annual Reports of Association of Bar of City of New York, pp. 295-296 (1938). See also a similar statement by the Association five years later. *Association of Bar of City of New York, Reports*, V, 80, No. 649 (1943).

[4] In addition to the Oklahoma standard cited in the Petition (p. 21 note) – a contract "such as no man in his senses and not under a delusion would make on one hand, and as no honest and fair man would accept, on the other" – see the following accurate description of the general situation: ". . .[A] majority of courts. . . have stated that they will set aside the contract if the fee is so excessive as to evidence a purpose on the attorney's part to obtain an improper and undue advantage over his client. Moreover, some courts may refuse to

vance was recognized by the commentators; and because it was such an advance the decision received considerable attention by them.[5] But it was precisely this inquiry – whether the fee claimed by respondent was reasonable or whether, to use the language of *Gair*, it was "out of all proportion to the value of the professional services rendered" – that the lower courts declined to make, restricting themselves to the fraud and overreaching test then and now advocated by respondent.

Respondent evidently also contends in the alternative that, even if the New York law had been applicable and had required an examination of the reasonableness of the fee, the outcome would have been the same, on the ground that the Court of Appeals observed that in a *quantum meruit* action "an award of 25% of the value of the recovery . . . would not be extravagant" (Br. in Opp. p. 10). We have already pointed out (Pet. pp. 22-23 n. 20, 32) that this narrow view of the evidence relevant to the reasonableness of a fee accords neither with common sense nor with the law prevailing in other jurisdictions, state as well as federal. But it should be noted particularly that *Gair* states specifically that in New York the standard is considerably broader: ". . . [N]o objection would lie against the rule if every lawyer filing a contingent fee retainer agreement were also required to file in his closing statement the amount of time he

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enforce a contingent fee that they consider unreasonable in view of the services rendered by the attorney." Note, 60 Colum. L. Rev. 242, 245. The commentator observed that some New York cases preceding *Gair* seemed to fall into the first category and *Gair* into the second.

[5] Schwarz, *Reflections on Gair v. Peck*, 11 Brooklyn Barrister (Oct. 1959); *Comments*, 2 Ariz. law Rev. 278 (Winter, 1960); 26 Brooklyn Law Rev. 130 (Dec. 1959); 60 Columbia Law Rev. 242 (Fall, 1960); 73 Harvard Law Rev. 1212 (April, 1960); 5 New York Law Forum 419 (Oct. 1959); 21 Ohio State Law J. 695 (Autumn, 1960); 32 St. John's Law Rev. 312 (May, 1958).

devoted to the case and an enumeration of the other facts underlying the elements entering into the value of the lawyer's services (Randall v. Packard, 142 N.Y. 47, 56, 36 N.E. 823, 824)." 160 N.E. 2d at 50. In *Randall*, the case cited in *Gair*, it was held that an instruction in a fee case that would lead the jury to look "entirely or principally" to the result attained by the attorney would be "distinctly erroneous." Thus, even the Court of Appeals' *dictum* is wrong under New York law.

In this connection, one further point deserves clarification. Respondent notes (p. 10) that the District Judge "had before him an extensive affidavit of services prepared by Mr. Shiya containing a recitation of the amount of legal work done in the Gibran litigation," and that this affidavit "was used by the petitioner's trial counsel in cross-examination. . . ." This is literally correct, but it should not be read to mean the district court applied anything like the *Gair* rule. The District Judge refused to allow cross-examination of Mr. Shiya on issues related to a determination of the "reasonable value" of Mr. Shiya's services on the theory the issue would be relevant only in *quantum meruit* proceedings. The affidavit prepared by Mr. Shiya was used by the District Court for the single issue of breach of duty—the "extensive cross-examination," as respondent puts it (p. 9), was directed to that issue. Respondent does not at any point take issue with our contention that, if the appropriate standard is broader than "fraud and overreaching," the lower courts erred. He simply denies that under *Gair* the standard is broader. As to that, he is wrong.

b. Respondent also maintains that the New York law respecting the resolving of ambiguities in fee contracts against attorneys is the same as the law applied by the lower courts. As to this, little need be added to what we have already said. We do not, of course, contend that "under New York law if a retainer is ambiguous then regardless of the circumstances the retainer must always be interpreted in favor of the client" (Br. in Opp. p. 18). What we do con-

tend is that, where the court concedes that *both* the contract and the surrounding circumstances are ambiguous, as the Court of Appeals did here, faithful adherence to the stringent New York decisions (Pet. p. 21 n. 19) requires denial of the claim of the attorney, not that of the client.

As Judge Hays pointed out in dissent, an attorney has a "duty to make clear the terms of his compensation to his client." That view is in accord with the prevailing New York law cited in our petition and with the prevailing view in other states. This principle supplies added force to the general hornbook rule regarding construction of ambiguous contracts against the drafter.

If that concept of the duty of an attorney to make clear the terms of his fee contract does not apply here, and if the rule of construction relevant to ambiguous fee contracts does not apply, there is very little left either of the concept or of the rule.

CONCLUSION

It is certainly true that this is not a case in which review would result in predictable alternative outcomes. It is not, for example, a case in which an indisputably clear state statute would control in one party's favor if it were applicable, but an indisputably clear federal statute would control in the other party's favor if *it* were applicable. If review were granted and if the Court determined that state law should control, it is possible that the Court would remand the case for reconsideration in the light of New York law rather than itself determining the content of that law. But we submit that at the least respondent's view of New York law is so dubious that certiorari should not be denied on the ground that such a remand could make no difference in outcome. Moreover, should this Court determine that the lower courts were correct in applying federal law, then the Court would face the problem of defining the content of that law. Surely the question whether the federal courts should limit their scrutiny of contingent fee contracts to

allegations of fraud and overreaching, and the question whether ambiguities in fee contracts should be resolved against attorneys rather than clients, are questions that warrant the attention of this Court if the federal courts are to fashion their own standards of regulation of attorney-client relations. Attorney-client fee litigation is commonplace in federal courts, and certain features of this case—a state law of expansive regulation of the reasonableness of attorney's fees as opposed to a restrictive federal court decision and an enormous fee charged against a foreign public charitable trust upon the basis of a fee contract and extrinsic circumstances concededly ambiguous—afford an unusual opportunity for testing some of the important opposing contentions. Accordingly, this case is a singularly appropriate vehicle for examination by this Court of the issues raised.

Respectfully submitted,

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